FILED
MAY 18 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant Attorney General
THOMAS J. CROWLEY
Assistant Attorney General

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Motion for Preliminary Injunction	1
Draft Preliminary Injunction	4
Affidavits in Support of Motion	8
1) Affidavit of Henry Herrmann Special Assistant Attorney General	8
2) Affidavit of Cornelius J. Wilson	13
3) Affidavit of Donald J. Zinn	15
4) Affidavit of Sidney Smookler Assistant Attorney General	18
Brief in Support of Motion	
Statement	21
Questions Presented	23
Statutes Involved	24
Summary of Argument	29
Argument	30
I. The United States Geological Survey Plans To Conduct, *Pendente Lite*, Explorations, By Means Of Drilling, Of That Portion Of The Outer Continental Shelf Subject To The Claims Of Massachusetts; In So Doing, The Geological Survey Is Acting Solely In Reliance On Purported Federal Statutory Authority Which Is Under Challenge In The Case At Bar	30
II. The Drilling Which The Plaintiff Intends To Conduct Will Result In A Change In The Status Quo *Pendente Lite*, To The Serious And Irremediable Harm Of Massachusetts, Which, Lacking An Adequate Remedy At Law, Is Entitled To A Preliminary Injunction	41
III. In The Event That The Court, In Its Discretion, Deems It Meet And Proper To Grant A Preliminary Injunction, Then Massachusetts Submits That A Bond Should Not Be Required	52
Conclusion	54

Page

TABLE OF CITATIONS

Cases

Bergen Drug Co., Inc. v. *Parke, Davis and Co.*, 307 F.2d 725 (3rd Cir. 1962) 48
Continental Oil Co. v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964) 54
Erhardt v. *Boaro et al*, 113 U.S. 537 (1885) 51
Ferguson v. *Tabah*, 288 F.2d 665 (2nd Cir. 1961) 53
Holcombe v. *Superior Oil Co.*, 213 La. 684, 35 So. 2d 457 (1948) 36
Layne Louisiana Co. v. *Superior Oil Co.*, 209 La. 1014, 26 So. 2d 20 (1946) 36
Meiselman v. *Paramount Film Distributing Corp.*, 180 F.2d 94 (4th Cir. 1950) 41
Natural Resources Defense Council, Inc. v. *Morton*, 337 F. Supp. 165 (D.D.C., 1971), *aff'd.*, 458 F.2d 827 (D.C. Cir. 1972) 46, 47
Natural Resources Defense Council, Inc. v. *Morton*, 337 F. Supp. 167 (D.D.C., 1971), *aff'd.*, 458 F.2d 827 (D.C. Cir. 1972) 47, 54
Phillips Petroleum Co. v. *Cowden*, 241 F.2d 586 (5th Cir. 1957) 36
Sinclair Refining Co. v. *Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932) 41
Unicorn Management Corp. v. *Koppers Co., Inc.*, 366 F.2d 199 (2nd Cir. 1966) 43, 48, 49
Urbain v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1964) 53
West Virginia Highland Conservancy v. *Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) 43, 48, 49
Zugsmith v. *Davis*, 108 F. Supp. 913 (S.D.N.Y. 1952) . 49

Page

Constitution and Statutes

United States Const. Amend. V 37
Act of March 3, 1879, 20 Stat. 394, 43 U.S.C. 31(a) . 32, 33
Act of September 5, 1962, 72 Stat. 427, 43 U.S.C. 31(b) 28, 29, 33, 35, 37
Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343 ..... 24, 35, 39
Section 2, 43 U.S.C. 1331 ..... 27, 24
Section 3(a), 43 U.S.C. 1332(a) 24, 34, 39
Section 5(a)(1), 43 U.S.C. 1334(a)(1) 25
Section 11, 43 U.S.C. 1340 ... 25, 30, 31, 32, 33, 37, 39
Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315 ..... 21, 25
Section 2, 43 U.S.C. 1301 25
Section 3(a)(b)(1), 43 U.S.C. 1311(a)(b)(1) 27
Section 4, 43 U.S.C. 1312 28
Section 9, 43 U.S.C. 1302 ..... 27, 34, 39
West's Louisiana Civil Code, art. 486 (1952) 33

Miscellaneous

Fed. R. Civ. P., Rule 65(c) 52, 54
Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83 Cong., 1st Sess. (1953) 638 . 31, 32, 34
H. Rep. No. 2156, 87 Cong., 2nd Sess. (1962) 2 36
Oversight Hearings held pursuant to S. Res. 45, by the Senate Committee on Interior and Insular Affairs, 92 Cong., 2nd Sess. (Mar. 23, 1972) part A., p. 2 ..... 32, 33
S. Rep. No. 650, 87 Cong., 1st Sess. (1961) 1 35

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

MOTION BY THE DEFENDANT, COMMONWEALTH OF MASSACHUSETTS FOR PRELIMINARY INJUNCTION

Defendant, Commonwealth of Massachusetts, moves the Court for a preliminary injunction against the Plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action:

1. Enjoining them from drilling or boring, by what-

ever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N35°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against foreign nations under applicable international law.

2. Enjoining them from licensing, permitting, or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one (a and b) above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role;

on the grounds that

1. Unless enjoined by this Court the Plaintiff, United States of America will commit the acts referred to in prayers numbered one and two above;
2. Such action by the Plaintiff will result in serious and irreparable harm to the Defendant as more particularly appears in the Affidavits attached hereto;
3. The issuance of a preliminary Injunction herein will not cause undue inconvenience or loss to the Plaintiff, but will prevent serious and irreparable harm to the Defendant, Commonwealth of Massachusetts.

And the Defendant, Commonwealth of Massachusetts further moves that in view of the seriousness and urgency of the subject matter of this Motion, the Plaintiff, United States of America, be required to respond hereto within such period of time as the Court may deem meet and proper to enable the Court to consider and rule on this Motion within the present Term of Court.

ROBERT H. QUINN
Attorney General
Commonwealth of Massachusetts

May, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

DRAFT

Preliminary Injunction

This cause came on to be heard on Defendant Commonwealth of Massachusetts' motion for a preliminary injunction and the Court having considered the motion, the affidavits in support of the motion and the affidavits in opposition thereto, and having considered the pleadings filed by the Plaintiff United States of America in opposition, the Court makes the following

Findings of Fact

1. The Plaintiff United States of America, during the pendency of this action and before same can be heard on its merits

a. Proposes to conduct drilling activities, through the Geological Survey in that portion of the North American Atlantic Continental Shelf with respect to which both the plaintiff and the defendant, Commonwealth of Massachusetts, claim the exclusive right of exploration and exploitation of the mineral resources of the subsoil; and

b. Proposes to contract with private companies to carry on the activity referred to in 1(a) above.

2. Defendant Commonwealth of Massachusetts contends that the plaintiff's conduct of such drilling as referred to in 1(a) above, and the plaintiff's contracting with private persons as referred to in 1(b) above would be unlawful and contrary to the rights of exclusive exploration, and the exclusive right to control and regulate such activity asserted by Defendant Commonwealth of Massachusetts in its answer, and further, that the alleged statutory authority which the plaintiff asserts as justification for the acts complained of by the Defendant Commonwealth of Massachusetts in its Motion for a Preliminary Injunction is directly in issue in this action.

3. The Defendant Commonwealth of Massachusetts further contends that the plaintiff's acts referred to in (1) above would expose Massachusetts to irreparable injury and serious damages, in an amount difficult or impossible to determine, resulting from oil spills in the area off the Massachusetts coast leading to serious, widespread, and irreparable damage to the marine environment in that area, and the defendant, Commonwealth of

Massachusetts further contends that it is without any adequate remedy at law.

4. Defendant Commonwealth of Massachusetts further contends that the issuance of a Preliminary Injunction herein will not cause undue inconvenience or loss to the plaintiff.

5. The Defendant Commonwealth of Massachusetts further contends that if the Court rules affirmatively on its motion, it should be exempted from the requirement of providing a bond.

6. The granting of a Preliminary Injunction is necessary to preserve the status quo until the merits of the case can be decided.

Conclusions of Law

1. Defendant Commonwealth of Massachusetts is entitled to a Preliminary Injunction on the terms of, and with the effect of, the ORDER set forth below.

And it is therefore

ORDERED that the plaintiff, United States of America, its elected and appointed officials and officers, and its agents, servants, employees, attorneys and all persons in active concert and participation with it, pending final hearing and determination of the action be

1. Enjoined from drilling or boring, by whatever method, for oil and gas exploration or for other general or specific data-seeking purposes, beyond a depth of twenty-five feet below the water column, within the area

of the Atlantic Continental Shelf which is claimed by Massachusetts and which is in issue in the case at bar, to wit, without limitation, an area: (a) starting at a point three miles from the New Hampshire/Massachusetts boundary with a coordinate of latitude 42°58′30″N., and longitude 70°47′00″W., and continuing along a line on a bearing of N86.07°30′E to a point of intersection with the 200 meter isobar of the North American Atlantic Continental Shelf, thence in a general southwesterly direction following the 200 meter isobar of the Continental Shelf to a point having the coordinate latitude 40°02′00″N., and and longitude 70°34′00″E., thence continuing landward in a general northwesterly direction on a bearing of N34°W., thence to a point in the vicinity of Block Island having the coordinate latitude 41°03′N. and longitude 71°31′E., thence northeasterly on a bearing N34°E., to a point 3 miles from the Massachusetts/Rhode Island coastal boundary having a coordinate of latitude 71°09′N., and longitude 41°27′30″, thence returning to the point of origin near the New Hampshire/Massachusetts boundary along a line 3 miles off the coastline of Massachusetts; and, (b) the Continental Shelf area abutting and seaward of the territory delineated in 1(a) above as far as the Plaintiff, United States of America claims national jurisdiction as against, foreign nations under applicable international law.

2. Enjoined from licensing, permitting or otherwise authorizing any non-federal governmental entity, and any legal and natural person from performing the acts delineated in prayer one (a and b) above;

provided, however, that nothing contained in the prayers one and two above shall be construed to interfere with the Armed Forces of the United States in the performance of their national defense role.

AFFIDAVIT

My name is Henry Herrmann.

I am a Special Assistant Attorney General of Massachusetts with an office at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts. I am a member of the Massachusetts and the Federal Bar.

I am submitting this Affidavit in support of the Motion being submitted to the Supreme Court of the United States, by the Attorney General of Massachusetts, which seeks to enjoin any drilling beyond a depth of twenty-five feet, by any federal agency or its licensee, in the area of the continental shelf to which Massachusetts makes claim in the case of *United States* v. *The State of Maine et al* until such time as the Court shall have rendered a decision in that litigation.

On May 1, 1973, at a meeting held at the office of the Department of the Massachusetts Attorney General, I was informed by representatives of the United States Geological Survey (Messrs. John Behrendt and John Hathaway) that the latter agency plans this summer to initiate a core drilling program off the coast of Massachusetts. I was given a copy of U. S. Geological Survey Map No. I-451 which had twenty prospective drilling sites indicated by markers thereon.

A cartographical analysis of this map revealed that all the sites marked thereon are in the offshore area claimed by Massachusetts in the case at bar. For the convenience of the Court, I attach hereto as Exhibit "A" a reproduction of the relevant portion of that map showing the sites marked by the Geological Survey.

I was informed by the Geological Survey that the core holes it intends to drill will have a depth of up to 50 feet in consolidated material and up to 1000 feet in unconsolidated material.

The purpose of this drilling program was alleged to be an analysis of the geological structure of this continental shelf area for scientific purposes; it was conceded, however, that "resource evaluation" was one of the motivating factors for this drilling.

The Geological Survey stated that there has been "shallow" drilling and bottom sampling of less than fifty feet in depth performed in the past both by the Survey and by private researchers in this area. The Survey admitted, however, that to their knowledge there had been no drilling in the past in this area even approaching the depths planned for this summer (up to 1000 feet).

The Survey representatives stated they had attempted to minimize the possibility of accidentally drilling into an oil or gas pocket by careful choice of the drilling sites based on the available seismic data, which includes the results of last years "Digicon Survey" (which Massachusetts sought to enjoin). Since the latter data is proprietory and restricted, the Geological Survey Scientist responsible for the choice of the sites stated that he had had access to only a part of what is alleged to be the latest and most accurate seismic survey of this area.

The Geological Survey conceded that the data they hoped to amass by this drilling would be of substantial benefit to oil companies if the latter obtained a lease for that area.

It was stated by the Survey that they hoped to begin the drilling in July of this year, subject to final approval by the Director of the Geological Survey and final confirmation of a $200,000 appropriation for this drilling project. The actual work would be contracted out to a commercial offshore drilling company.

The Survey representatives stated that they did not at this time consider it desirable or legally necessary that an Environmental Impact Statement under the National

Environmental Policy Act of 1969 be prepared. They stated that an "in house" environmental assessment was in the final stages of preparation, but that they were unable to provide Massachusetts with a copy at this time.

The Attorney General of Massachusetts wrote to the Secretary of the Interior of the United States on May 10, 1973, requesting "immediate and explicit" assurance that the drilling would not be conducted. No reply has as yet been received.

On the basis of the affidavits of Messrs. Cornelius J. Wilson and Donald J. Zinn, as expert witnesses, attached hereto, I believe that prospective federal drilling program in this area exposes Massachusetts to the risk of accidental oil spillage and resultant serious harm to its marine environment. Consequently, I believe that Massachusetts is threatened with immediate, serious, and irreparable harm for which it lacks an adequate remedy at law.

(s) HENRY HERRMANN
HENRY HERRMANN
Special Assistant
Attorney General
Commonwealth of Massachusetts

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

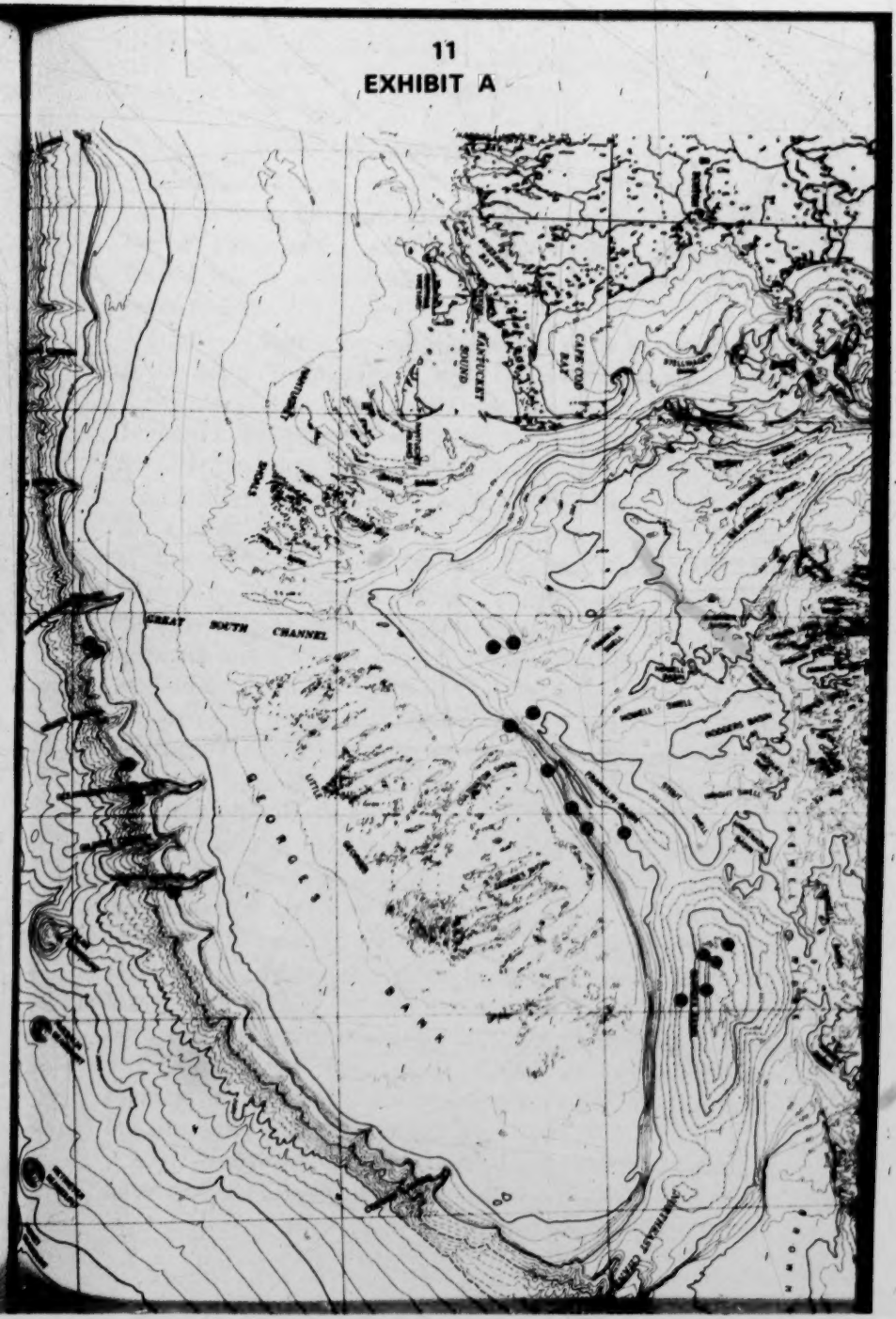
On this seventeenth day of May, 1973 before me personally appeared Henry Herrmann to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires:
June 27, 1979

11

EXHIBIT A



AFFIDAVIT

My name is Cornelius J. Wilson. I am Assistant Director of Engineering and Research at the University of Rhode Island, a position which I have held for the last seven years.

I have a degree in engineering from the Massachusetts Institute of Technology. I hold engineering licenses from the State of New York and from the State of California. I am the President-elect of the Providence Engineering Society, the state engineering association in Rhode Island.

Immediately following World War II, as a Colonel in the United States Air Force, I was appointed Director of the entire German chemical industry under SHAEF (Supreme Headquarters Allied Expeditonary Forces).

Thereafter, I was employed for over ten years as an engineer and a Senior Project Engineer in the oil industry, including Union Oil Company of California, C. F. Braun Construction Engineers, and the Shell Oil Company. In addition, for over two years, I was the Assistant Technical Director of the National Oil Fuel Institute, a national oil industry organization.

As a result of over thirty years professional experience, all of it related to the petroleum industry, I consider myself conversant with all major aspects of the petroleum industry. I have in recent years been particularly interested in offshore petroleum technology, and I have followed with special interest the matter of the Santa Barbara offshore spill, especially its causes. For this reason, I consider myself professionally qualified to testify concerning the inherent risk factors in the offshore core drilling presently under consideration.

At the office of the Massachusetts Attorney General, I have had the opportunity to examine in detail U. S. Geological Survey Map No. I-451, which shows the offshore

area in which the Geological Survey intends to drill core holes of up to 1,000 feet in depth in unconsolidated material and up to fifty feet in depth in consolidated material. The prospective drilling sites were indicated on the map. In addition, I have examined the available published geological data relating to these sites and this overall continental shelf area.

It is my professional opinion that there is an element of risk, in the drilling of these holes, of accidentally penetrating an oil or gas retaining geological structure. The degree of risk would, of course, vary with the precise location of the drilling site and the precise depth. However, even assuming that a particular site has been carefully chosen, on the basis of seismic data of the most precise and up-to-date nature, with a view to minimizing such risk, a certain degree of risk nevertheless is inherent in this activity and cannot be discounted or eliminated. This is because the present state of the art is not an exact science. If seismic data were sufficient, there would clearly be no need at all for core drilling. Any such drilling venture has to be a journey into the unknown to some extent. I would like to point out that the major oil companies lose many millions of dollars annually in dry holes at sites where, based on information obtained by present state of the art technology, they had fully expected to strike oil.

Obviously, the converse is true: there can be no assurance that one will not strike oil even if one is attempting to avoid doing so, especially in a general area which has generated exploration interest. This is certainly the case at the drilling depths under consideration in the present instance.

The same element of inherent uncertainty pertains to the extent of damage if oil were to be accidentally released. The damage would, of course, vary with the

amount of release, the duration of release, and water currents and meteorological conditions. Rapidly containing an accidental release can be a major enterprise of uncertain success, depending on many interrelated complex factors.

(s) CORNELIUS J. WILSON
CORNELIUS J. WILSON

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

On this fifteenth day of May, 1973 before me personally appeared Cornelius J. Wilson to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) JOHN J. WARD
JOHN J. WARD
Notary Public

My Commission Expires:
July 3, 1975

AFFIDAVIT

My name is Donald J. Zinn. I am Professor of Zoology specializing in Marine Ecology and a Research Associate of the Narragansett Marine Laboratory at the University of Rhode Island.

I am a graduate of Harvard College with a degree in Zoology, and I hold a Ph.D. in Zoology from Yale University.

In addition to several other professional organizations, I am a member of the Marine Biological Association of the United Kingdom. I am co-editor of the bulletin *Psammonalia,* which deals with the microscopic fauna of the marine sediment. I have devoted considerable time and research to the problem of oil pollution in the marine environment. My most recent publications in this area are "Recommendations for Research on Deep-Ocean Fouling" published by the U. S. Naval Ordnance Systems Command (Tech. Report 4004-1, April, 1970) and "The Impacts of Oil on the East Coast" published by the Wildlife Management Institute, in 1971.

I have been informed of the proposed drilling program by the United States Geological Survey this summer in the continental shelf area off Massachusetts. In this connection, I have examined, at the office of the Massachusetts Attorney General, the U. S. Geological Survey Map No. I-451, which shows the proposed drilling sites.

I consider myself qualified to testify as to the damage that could be caused by the release of oil in any considerable quantity from any holes drilled in this area.

I would first distinguish between long term and short term effects. The latter can be extremely severe and can involve massive fish kills, destruction of marine birds, and the fouling of beaches and resultant effect on recreational use.

The long term effects, even though they have not received equal attention in the news media, are even more severe, and the full extent thereof may not become apparent for years and is at present not yet fully understood.

It seems certain that the toxic material in crude oil will enter the marine food chains and will ultimately have long term effects on innumerable marine species,

including species of important food fishes. The Georges Bank area, of course, is one of the world's most important fisheries grounds and is vital to the Massachusetts fishing industry. The hydrocarbons from oil, once incorporated into a particular marine organism, are stable and pass from one member of a food chain to another.

I would like to provide some specific examples of such damage: Black Quahogs, used in making chowder, have been killed in immense quantities in New Hampshire by oil spills, and the species have not recovered as yet. The same occurred with respect to such commercially important crustaceans such as crabs and lobsters. Professor Blumer of Woods Hole Oceanographic Institute has done fascinating work which indicates that even minute traces of oil in the water may destroy the lobster as a local species by interfering with the animal's sophisticated and, as yet not fully understood, chemical signal mechanisms.

There is presently no known method of satisfactory oil cleanup once the spill has spread along the ocean bottom to any extent. The long term biological effects I have touched upon above could therefore not be arrested or reversed once such a spill has, in fact, occurred.

Damage to the marine environment, on the ocean bottom, off Massachusetts, if oil is released in any quantity, would therefore be of a grievous and permanent nature according to what is presently known.

I therefore look with deep misgiving and concern upon any drilling program in this area, under the presently existing technology, which poses even a slight risk of accidental oil release.

(s) DONALD J. ZINN
DONALD J. ZINN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

On this fifteenth day of May, 1973 before me personally appeared Donald J. Zinn to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) COLEMAN G. COYNE, JR.
COLEMAN G. COYNE, JR.
Notary Public

My Commission Expires;
June 27, 1979

AFFIDAVIT

My name is Sidney Smookler.

I am an Assistant Attorney General of the Commonwealth of Massachusetts. I am a member of the Massachusetts and Federal Bar, and am also a Registered Professional Engineer and a Registered Massachusetts Land Court Examiner.

My office is at the Department of the Attorney General, 131 Tremont Street, Boston, Massachusetts.

I am submitting this affidavit in support of the Motion for a preliminary injunction being filed by Massachusetts in the case of *United States* v. *The State of Maine, et al, No. 35 Original.*

I have read the aforementioned Motion for a Preliminary Injunction. I prepared the description in the Motion of that area of the North American Atlantic Continental Shelf which is claimed by Massachusetts and is in issue in the case at bar, according to the best of my professional

experience and judgment. I believe the aforesaid description to be the most accurate and proper one that I could construct on the basis of the available applicable legal data and geographical methodology. I was assisted in the task by experts from the Geodetic Division, Massachusetts Department of Public Works.

This description is the best possible delimitation of this area under the circumstances and I do not intend to represent to the Court that the legal principles and geographical methods employed are necessarily conclusive.

I have examined a copy of the United States Geological Map No. I-451 which I am informed was turned over by the Geological Survey to Special Assistant Attorney General Henry Herrmann, showing twenty drilling sites marked by the Geological Survey.

I have made a professional determination that these drilling sites are within the area encompassed by the description in the Motion.

(s) SIDNEY SMOOKLER
SIDNEY SMOOKLER
Assistant Attorney General
Commonwealth of Massachusetts

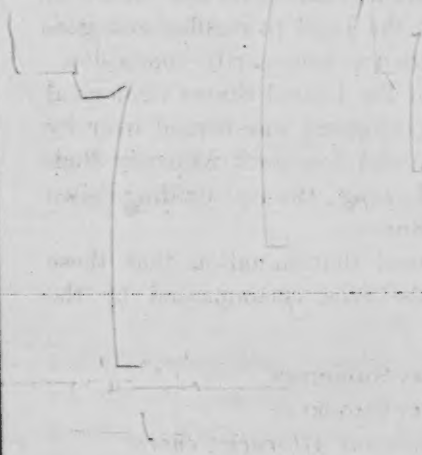
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

On this 18th day of May, 1973 before me personally appeared Sidney Smookler to me known to be the person described in, and who executed the foregoing Affidavit, and he acknowledged that he executed the same, and made oath as to its truth.

(s) LAWRENCE J. O'KEEFE
LAWRENCE J. O'KEEFE

My Commission expires:
August 17, 1977



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

STATEMENT

This action was brought by the Plaintiff United States of America against the thirteen Atlantic coastal states, including the Defendant Commonwealth of Massachusetts, in order to establish, as against the defendants, that the United States has the exclusive right to explore and exploit the natural resources of the North American Atlantic Continental Shelf more than three miles seaward from the coast line. The complaint generally alleged that the United States had these rights prior to the enactment, in 1953, of the Submerged Lands Act (67 Stat. 29, 43 U.S.C. 1301-1315).

The complaint further alleged that this Act gave the defendants the ownership of the seabed within their boundaries to a maximum of three miles seaward from the low water mark, but that the United States, by virtue of the Submerged Lands Act retained jurisdiction over the remainder of the continental shelf. Also alleged in the complaint is that the defendants claim rights to this remainder of the continental shelf which are adverse to the plaintiff. The United States prayed for a declaration of its exclusive rights to the area in question as described above.

The Defendant Commonwealth of Massachusetts specifically denied the allegations in the plaintiff's complaint, and in addition asserted in an affirmative defense that the Commonwealth of Massachusetts, as the successor to certain royal charters, is entitled "to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the plaintiff;" Massachusetts prayed for a declaration of its rights as against the plaintiff to exclusive dominion and control to the seabed and subsoil in question. All defendants except Florida submitted answers generally paralleling Massachusetts' historical claim.

In January of 1970 the plaintiff moved the Court for judgment on the ground that allegedly no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. The defendants in January of 1970 moved that the Court refer the case to a master. By its order of June 8, 1970, the Court granted the latter motion and referred the case to a special master. The Defendant State of Florida was severed from the case for all purposes on June 28, 1971.

The case proceeded to be heard before the Special Master, the Honorable Albert Branson Maris, Senior United States Circuit Judge, pursuant to his procedural order of August 27, 1971.

On June 9, 1972 the Defendant Commonwealth of Massachusetts moved the Court for a preliminary injunction against oil exploration by the United States and its licensees. The Motion was denied by the Court in its order of June 26, 1972.

The hearing of the case before the Special Master has recently been concluded. The Special Master has ordered that the Plaintiff, United States of America submit to him its proposed findings, conclusions and supporting brief on or before June 1, 1973. Pleadings by the Defendants in response thereto are due August 1, 1973.

As stated on the attached affidavits, the Defendant Commonwealth of Massachusetts is concerned that the acts of the plaintiff will unilaterally disrupt the status quo, to the serious and irremediable harm of Massachusetts before this case is decided on its merits; for this reason, Massachusetts makes its motion for a preliminary injunction.

Questions Presented

1. Is the right of the Plaintiff United States of America to conduct or license explorations on the outer continental shelf in issue in the case at bar?

2. Will such explorations by means of drilling *pendente lite* disrupt the status quo to the irremediable harm of Massachusetts?

3. Is Massachusetts entitled to a preliminary injunction to preserve the status quo under the factual situation it has alleged?

Statutes Involved

1. The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343, provides in pertinent part:

Sec. 2.

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation. [67 Stat. 462, 43 U.S.C. 1331.]

Sec. 3.

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. [67 Stat. 462, 43 U.S.C. 1332.]

Sec. 5.

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. [67 Stat. 464, 43 U.S.C. 1334(a)(1).]

Sec. 11.

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [67 Stat. 469, 43 U.S.C. 1340.]

2. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1315, provides in pertinent part:

Sec. 2.

When used in this chapter —

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high

water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and

plant life but does not include water power, or the use of water for the production of power:
(g) The term "State" means any State of the Union; [67 Stat. 29, 43 U.S.C. 1301.]

Sec. 9.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. [67 Stat. 32, 43 U.S.C. 1302.]

Sec. 3.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recoginzed, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, ex-

cept as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . . [67 Stat. 30, 43 U.S.C. 1311 (a)-(b)(1).]

Sec. 4.

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. [67 Stat. 31, 43 U.S.C. 1312.]

3. *Geological Survey.*

Section 31 of Title 43, United States Codes, provides in pertinent part:

(a) The Director of the Geological Survey, which office is established, under the Interior Department, shall be appointed by the President by and with the advice and consent of the Senate. This officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain. The Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations.

(b) The authority of the Secretary of the Interior, exercised through the Geological Survey of the Department of the Interior, to examine the geological structure, mineral resources, and products of the national domain, is expanded to authorize such examinations outside the national domain where determined by the Secretary to be in the national interest. [20 Stat. 394, as amended by 76 Stat. 427, 43 U.S.C. 31 (a)-(b).]

Summary of Argument

Massachusetts alleges that during the pendency of this action the Plaintiff United States of America plans, through the United States Geological Survey, to conduct explorations, by means of drilling up to 1,000 feet in depth, in that area of the North American Atlantic Continental Shelf which would be subject to the exclusive exploration right of Massachusetts if it prevailed in the case at bar. Massachusetts claims that the federal statutes under which the plaintiff asserts its purported exploratory rights are invalid, and are squarely in issue in this case;

therefore, the plaintiff is not entitled to assert its claimed exploration rights *pendente lite.*

The drilling which the Geological Survey plans to conduct poses a serious threat to the Massachusetts environment. Accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, to the Massachusetts fishing industry, and to the marine ecology. The commencement of this drilling program by the Geological Survey is therefore a significant and dangeruos alteration of the status quo. Massachusetts will have the right to decide for itself, if it prevails in this lawsuit, whether it will permit this type of drilling off its coast, and this crucial decision-making right should not be preempted by the opposing litigant at this time.

The damage threatened to Massachusetts is serious and irremediable, with no remedy at law available; in contrast, a preliminary injunction would not create an undue hardship to the plaintiff. Under the applicable doctrines of equity, Massachusetts is entitled to a preliminary injunction which will preserve the status quo pending a final decision by this Court.

Argument

I. THE UNITED STATES GEOLOGICAL SURVEY PLANS TO CONDUCT, *Pendente lite*, EXPLORATIONS, BY MEANS OF DRILLING, OF THAT PORTION OF THE OUTER CONTINENTAL SHELF SUBJECT TO THE CLAIMS OF MASSACHUSETTS; IN SO DOING, THE GEOLOGICAL SURVEY IS ACTING SOLELY IN RELIANCE ON PURPORTED FEDERAL STATUTORY AUTHORITY WHICH IS UNDER CHALLENGE IN THE CASE AT BAR.

A. *The Alleged Statutory Authority For The Activity By The Federal Government Which Massachusetts Seeks To Enjoin Is The Outer Continental Shelf Lands Act, Sec. 11,67 Stat. 462, 43 U.S.C. 1340.*

The basis for the alleged authority of the United States Geological Survey to conduct such explorations itself and to approve of their being conducted by private persons, is the Outer Continental Shelf Lands Act, sec. 11, 67 Stat. 462,43 U.S.C. 1340. This statue states:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Self, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. 1340.]

Before discussing the relevance of this statute, we would like to make some preliminary comments on its interpretation and present implementation. The words "any agency of the United States" could not, we believe, be interpreted as an omnibus enabling act for any federal agency to conduct such explorations even if the latter had no possible relevance to its general purpose or function. Rather, these words would seem to refer to any federal agency otherwise legally authorized to carry on general activities of this nature. The latter interpretation is supported by the legislative history of this section. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 638.

The second comment we would make on the wording of this statute is that the requirement for authorization by the Secretary pertains only to "persons" as defined in the Act; there is no need for an "agency" to obtain this authorization. This is clearly indicated by the legislative history — the Justice Department recommended that "persons" be obliged to obtain approval by the Secretary

as a prerequisite to exploration. Hearings on S. 1901, *supra*, at 706.

We submit, therefore, that an accurate paraphrasing of this statute is that the relevant offshore area is open to exploration by any federal agency, otherwise legally authorized, and by persons who obtain the approval of the Secretary of the Interior. The Secretary of the Interior has delegated to the Director of the United States Geological Survey this alleged prerogative to authorize exploration by "persons."

We return now to the relevance of this Section to the subject matter of this Motion — as we argue, this Section is the sole authority which the Geological Survey can allege for its conduct of exploration of this offshore area. We think it most significant that the Department of the Interior, which has under it the Geological Survey, [see Act of Mar. 3, 1879, 20 Stat. 394, 43 U.S.C. 31(a).] has expressed precisely the same position in a document of most recent vintage. The Chairman of the Senate Committee on Interior and Insular Affairs submitted a series of questions to Mr. Hollis M. Dole, Assistant Secretary for Mineral Resources, Department of the Interior. One of several questions under the heading "The Present Legal Regime For The Outer Continental Shelf" was "Which entities within which Federal Agencies have been assigned O.C.S. [Outer Continental Shelf] responsibilities . . .?" The Assistant Secretary of the Interior replied: "The Geological Survey is also responsible for geological and geophysical exploration under section 11 of the OCS Act (43 U.S.C. §1340)." Oversight Hearings held pursuant to S. Res. 45, by the Senate Committee on Interior and Insular Affairs, 92nd Cong., 2nd Sess. (Mar. 23, 1972) part A., p. 2. These were written questions and answers, prepared in advance of the hearings and inserted into

the record at the Under Secretary's request. Oversight Hearings, *supra,* "Opening Remarks," p. 8.

B. *Absent The Provisions of Section 11 Of The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C., 1340, The United States Geological Survey Has No Other Legal Authority To Conduct These Explorations Of The Outer Continental Shelf.*

The question now arises whether, if section 11 (43 U.S.C. 1340) is invalid, the Geological Survey has any recourse to other legal authority for its explorations of this offshore area. We submit it has none. It is our contention that the Geological Survey could not rely on its general enabling act, (20 Stat. 394, *as amended* by Act of Sept. 5, 1963, 76 Stat. 427, 43 U.S.C. 31(a)-(b).), to give legitimacy to its Outer Continental Shelf exploration. That statute provided in subsection (a) that the Director of the Geological Survey ". . . shall have the . . . examination of the geological structure, mineral resources, and products of the national domain." [43 U.S.C. 31(a).] Surprisingly, the term "national domain", which has existed in that statutory context since 1879, has apparently never been afforded a precise statutory or judicial definition. The term has been rather loosely defined by a Louisiana statute (which admittedly is not controlling here):

> The national domain, properly speaking, comprehends all the rights which belong to the nation, whether the latter is in the actual enjoyment of the same, or has only a right to reenter on them. Art. 486, West La. Civil Code (1952).

In our opinion, perhaps the most encompassing definition of "national domain" which we could advance to the Court

would parallel the delineation of the areas subject to the authority of the Conservation Division of the Geological Survey:

> . . . lands under the supervision or control of the Federal Government. These lands are divided for administrative purposes into five categories: First, the domain; second, the acquired lands which are lands acquired by the Federal Government for various purposes; third, the Indian lands, both tribal and allotted, for which the United States acts as trustee for the Indian owners; fourth, certain naval petroleum reserve lands by virtue of a cooperative arrangement with the Department of the Navy; fifth, the so-called military and miscellaneous lands, which are not subject to any of the mineral leasing laws. Hearings on S. 1901 Before the Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953) 563. (Statement of H. J. Duncan, Chief, Conversation Div., Geological Survey, Dept. of Int.).

We would note that only the assertion of federal dominium by virtue of the Submerged Lands Act, §9 [67 Stat. 29, 43 U.S.C. 1302] and the Outer Continental Shelf Lands Act, §3A [67 Stat. 462, 43 U.S.C. 1332] would suffice to justify an argument by the plaintiff that the Outer Continental Shelf is included within the aforegoing definition of "national domain." The validity of federal assertion of dominium, however, is precisely what is in issue, and that is why we argue that the Geological Survey cannot rely, in this instance, on its statutory authority to explore the "national domain." We would further note that while we cannot state with utter precision what the "national domain" *is*, we have certain clear indications

what it is *not*: as the word "domain" and the above quoted Louisiana statute indicate, the term is by no means co-extensive with the imperium of the United States Government. Further, "national domain" does *not* include the Outer Continental Shelf even if the Federal Government did have dominium over this area. We justify this assertion on the legislative history to the Congressional extension, in 1963, of the authority of the Geological Survey to areas *outside* the national domain. [Act of Sept. 5, 1962, 76 Stat. 427, 43 U.S.C. 31(b).]

The Senate Report on the bill (S. 981) stated, in the paragraph entitled "NEED FOR LEGISLATION": "Passage of S. 981 would permit the Geological Survey to conduct investigations of the Outer Continental Shelves and ocean floor . . . ." S. Rep. No. 650, 87th Cong., 1st Sess. (1961) 1. This much seems clear: if the Geological Survey, in order to explore the Outer Continental Shelf, required authority to operate *outside* the "national domain," then the latter was *not* considered to encompass the Outer Continental Shelf. We would like to add that "Outer Continental Shelf," in this Senate Report, had to refer to the Continental Shelves of the Coasts of the United States since "Outer Continental Shelf" has no legal or scientific meaning other than a term of art created by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343.[1]

The fact that the Geological Survey, since 1962, has had its exploration authority extended *outside* the "national domain" raises the question whether the Survey could rely on this amendment in the case at bar, assuming as we argue, that the Outer Continental Shelf Lands Act is invalid and that the Outer Continental Shelf is not *within*

[1] The term "Outer Continental Shelf" is utilized in this brief for convenience of geographical reference only; we do not thereby recognize any legal implications of the creation of that term by a federal statute, the validity of which we are challenging.

the "national domain." We submit that the Survey definitely cannot rely on the extension of its authority to areas outside the "national domain"; the clear implication of this 1962 amendment is that the Survey may operate outside the national domain (anywhere in the world) subject to the consent of the relevant property owner, whether the latter be the foreign, state, or local government or private person having dominium over the area to be explored. Only in the case of *res nullius* could the Survey act unilaterally. For example, the legislative history to the 1962 amendment states that explorations by the Survey in foreign countries was contemplated. H. Rep. No. 2156, 87th Cong., 2nd Sess. (1962) 2. It seems axiomatic that Congress did not intend to authorize the Survey to conduct explorations in areas subject to the political control of a foreign government *without* the latter's consent. We suggest, further, that there is no need for the Court to reach the issue whether it would be within the legitimate exercise of Congressional authority to authrize the Geological Survey to explore the oil and gas deposits *anywhere* within the imperium of the United States Government, if the lands in question were State or privately owned. If we assume, *arguendo,* that this would indeed be within the power of the Congress, then the implementation of such authority to survey would have to be accompanied by just compensation to the property owners involved together with proper procedural safeguards. The exclusive right of an owner to explore for oil and gas on his land has been held to be an important property right by all federal and state courts which have had occasion to rule on this issue: *See, e.g., Phillips Pet. Co.* v. *Cowden,* 241 F.2d 586 (5th Cir. 1957); *Holcombe* v. *Superior Oil Co.,* 213 La. 684, 35 So. 2d 457 (1948); *Layne Louisiana Co.* v. *Superior Oil Co.,* 209 La. 1014, 1020, 26 So. 2d 20, 22 (1946). Therefore, if we were to

interpret the provision of the 1962 amendment, 76 Stat. 427, 43 U.S.C. 31(b), as omnibus authority for the Geological Survey to explore for oil and gas on state or privately owned land, we submit that the exercise of this authority, against the will of the property owner involved, would, in the absence of due process and just compensation, be unconstitutional by virtue of the provisions of the Fifth Amendment to the United States Constitution. We submit that the same argument would apply to any federal agency other than the Geological Survey which purported to have the right to explore this area under color of federal law.

The alleged authority of the Geological Survey, by delegation of the Secretary of the Interior, to license private "persons" to conduct such explorations can find no basis other than the above discussed section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) which is under challenge here. We would further argue that any attempt by the Congress to authorize other federal officers or agencies to grant such licenses to private persons would be subject to the same constitutional limitations discussed above in the event that the private licensee did not obtain the relevant property owner's consent.

C. *The Statutory Authority Relied Upon By The Plaintiff United States Of America To Conduct These Continental Shelf Explorations Is Directly In Issue In The Case At Bar, Since Both The Plaintiff And The Defendant Massachusetts Claim, In Their Pleadings, The Exclusive Right To The Offshore Area In Question.*

On page seven of Plaintiff's Brief in Support of Motion for Judgment, the plaintiff stated the "*Question Presented*" as being: "Whether the right to explore and ex-

ploit the natural resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coast line belongs to the United States or to the Defendant States." Furthermore, in the "*Introduction and Summary*" to the argument in the aforementioned brief, the plaintiff stated:

> *The* issue in this case is whether the United States has, as against the defendant states, *the exclusive* right to *explore* and exploit the natural resources of the continental shelf under the Atlantic Ocean, more than three miles from the coast line. Brief of the United States in Support of Motion for Judgment, *supra,* pp. 10-11. (Emphasis supplied.)

In its answer, the Commonwealth of Massachusetts alleged as an affirmative defense that it is "entitled to exercise exclusive dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to its coast line, subject to the limits of national seaward jurisdiction established by the Plaintiff;" Mass. Ans., p. 4. In so alleging, the Commonwealth of Massachusetts has directly challenged Plaintiff United States' contention of exclusive right to explore and exploit the natural resources in question, which according to the plaintiff's pleadings is the issue in this case.

This central issue which has been joined in this case, directly puts into issue also those federal statutes which assert federal dominium over the geographical area in controversy.

With respect to domestic law, the first federal statute to assert the claim of the United States (as against the states) to the natural resources of the area now referred

to as the Outer Continental Shelf was the Submerged Lands Act, sec. 9 (67 Stat 29, 43 U.S.C. 1302).

That section purported to "confirm" the "jurisdiction and control" of the United States, and had the purpose of emphasizing that the Submerged Lands Act would not affect the rights of the United States to the area seaward of the historical boundaries of the States (the Outer Continental Shelf). Federal dominium over this offshore area was subsequently reaffirmed and expanded by the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331-1343). Section 3(a) states:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . . . 43 U.S.C. 1332(a).

It is crucial to note that federal dominium, presently and at the time of the aforementioned legislation, is precisely what is at issue in this case; if the defendants prevail, the federal legislation which asserts United States dominium is invalid. The federal "right of disposition" under the Outer Continental Shelf Lands Act, sec. 3(a) as manifested, for example in section 11 of that Act (43 U.S.C. 1340), which the Geological Survey relies on, would be non-existent.

Upon protest by the Commonwealth of Massachusetts, the Department of the Interior agreed not to disrupt the status quo *pendente lite* by means of undertaking leasing procedures under the provisions of the Outer Continental Shelf Lands Act 67 Stat. 462, 43 U.S.C. 1331-43. We submit that this is a clear indication that the plaintiff, through the Secretary of the Interior and his solicitor, realizes full well that federal dominium, by virtue of the Outer

Continental Shelf Lands Act, is directly in issue in this case. On November 23, 1971, in reply to a letter from Henry Herrmann, Special Assistant Attorney General, Mr. David E. Lindgren, Associate Solicitor for the Department of Interior wrote that in a press release, the Secretary of Interior had

> noted that the issue of seabed jurisdiction presently in litigation in *United States* v. *State of Maine,* No. 35, Original, is a paramount consideration, and consequently "No leasing procedures — *no action toward such procedures, in fact* — can be undertaken until the Supreme Court decides that boundary issue or the States and the Federal Government make interim arrangements for leasing pending the Supreme Court decision." [emphasis added.]

Mr. Lindgren added that this appeared to meet the concerns expressed by the Attorney General of Massachusetts.

We are totally at a loss to understand by what reasoning the Federal Government, through the Department of the Interior, recognizes, on one hand, that it has no right *pendente lite* to disrupt the status quo by exercising its leasing prerogatives under the Outer Continental Shelf Lands Act, yet on the other hand, blithely assumes that it may conduct explorations under that same Act. In granting an oil drilling lease under a disputed statute (which the Interior Department admits it cannot do) and in conducting explorations itself by drilling 1,000-foot deep holes, under the very same disputed statute (which the Interior Department is confident it can do) there is at best a narrow distinction (and one of dubious relevance) in the context of this Motion for temporary equitable relief. If, as the plaintiff recognizes, federal dominium is in issue, then the plaintiff does not, we submit, have

the right unilaterally to make the decision which of its alleged rights under the Outer Continental Shelf Lands Act it will assert or refrain from asserting pending a final decision by this Court.

II. THE DRILLING WHICH THE PLAINTIFF INTENDS TO CONDUCT WILL RESULT IN A CHANGE IN THE STATUS QUO *Pendente Lite*, TO THE SERIOUS AND IRREMEDIABLE HARM OF MASSACHUSETTS, WHICH, LACKING AN ADEQUATE REMEDY AT LAW, IS ENTITLED TO A PRELIMINARY INJUNCTION.

A. *The Purpose Of A Preliminary Injunction Is To Preserve The Status Quo Pendente Lite, Which Constitutes, In This Case, Absence Of This Type Of Drilling Activity In The Continental Shelf Area Claimed By Massachusetts, And The Present State Of Its Marine Environment.*

"The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal and according to the principles of equity." *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F.2d 42, 45 (4th Cir. 1932); *accord, Meiselman* v. *Paramount Film Distributing Corp.*, 180 F.2d 94 (4th Cir. 1950).

The issue that is in the forefront, therefore, is how to delineate the status quo which Massachusetts seeks to preserve *pendente lite*. We submit that the status quo, viewed within the scope of this motion and the physical activity against which it is directed, is the absence, at the present time, of the type of drilling intended by the Federal Government in this particular area. We are not aware of any drilling activity being conducted at all at

the present time. Therefore, we argue, this summer's drilling program is a clear-cut change in the status quo.

In the "Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts", filed in June of 1972, the United States advanced its own definition of the relevant status quo. It noted on page 9 that "exploration of the Atlantic Seabed has been in progress since 1960" and defined the status quo as being the continuation of the "information collecting process." The meaning of "exploration" in this context was further defined, on page 2 of that brief: ". . . the United States unequivocally stated that it would continue with geological and geophysical explorations and informal information gathering activities which would include seismic tests and shallow core sampling." "Shallow" core sampling was defined, with limited success, as not constituting "deep drilling."

Without getting involved in the fruitless semantic morass of discussing what the maximum depth of a "shallow" hole in the ground can be before it must be designated as "deep," we would merely say that if we use the past activity as a baseline, drilling to 1,000 feet is an activity which creates a radically increased magnitude of risk, and is therefore a fundamental departure from the alleged previous practice. The element of risk in drilling holes of such depth is discussed in the affidavit of Mr. Cornelius J. Wilson, attached hereto. Further, we would emphasize that the United States has as yet to clearly demonstrate, rather than vaguely allege, that even this limited "shallow core sampling" has in fact occurred in the area subject to this motion.

Even if we assume, *arguendo,* that the mere allegation that "shallow core sampling" has taken place at some time in the past in this or in a contiguous area suffices to constitute a continuation of such activity as the status

quo, we would nevertheless argue that the drilling which the Federal Government proposes this summer (up to 1,000 feet in depth) is different in kind, and not in mere degree, from the alleged previous activity.

Massachusetts, therefore, argues that the definition of the status quo in this instance is either the aggregate of alleged prior activity, or a change in the nature of the activity, (a radical increase in drilling depth); under either definition, the proposed drilling is a significant alteration of a material status quo *pendente lite.*

B. *The Disruption Of The Status Quo By The Plaintiff And Its Licensees During The Pendency Of This Action Threatens Serious And Irreparable Harm To Massachusetts.*

A criteria frequently stated by the courts for the balancing of the equities in a motion for a preliminary injunction is the seriousness of the irreparable harm alleged by the moving party against the possible damage that the opposing party would incur after injunction was granted. *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 235-36 (4th Cir. 1971); *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d 199, 205 (2nd Cir. 1966). We would like to focus at this point on the contrast between the harm with which Massachusetts is threatened, and the absence of possible damage to the United States if the preliminary injunction were granted. If the Federal Government proceeds to drill holes of this depth, the very real possibility exists that there will be substantial oil spillage or leakage, which will be difficult or impossible to contain rapidly. (See Mr. Wilson's affidavit to this effect, attached hereto). We emphasize that the United States should not prevail on an argument that they are attempting

to minimize the risk or that the probability of serious harm is being kept as low as possible.

The fact is that the Geological Survey is *ab initio* not in complete control of the factors which will determine whether an accidental release of oil will occur, since, as Mr. Wilson stated in his affidavit, there is an irreducible element of luck in this venture — "a journey into the unknown," as he put it. The risks involved may well be acceptable to the Geological Survey; however, it is not that Agency, but the Commonwealth of Massachusetts which will have to contemplate the ruination of its coastal recreation area, the economic decline of its important fishing industry, and the general destruction of its offshore environment if the game of chance to which Massachusetts is being unwillingly subjected ends to its disadvantage. Professor Zinn, in his attached affidavit, has outlined how grave the scope of damage is, and how irreparable under our present state of knowledge. This factor, we argue, should certainly be balanced against any statement by the United States that the Agency involved has in good faith attempted to minimize the risk, for, we submit, the element of risk cannot be divorced from the resultant damage. This is not a two-stage analysis, with an abstract exercise in probability, to be followed by a separate and unrelated estimate of damages; the two are intertwined in such a factual situation.

The damages involved would be severe and pervasive; at present, they could not be empirically assessed by present methods of technology, much less quantified or reduced to monetary terms by any rational formula. To assess damages at law would therefore be difficult, if not impossible, to say nothing of the serious legal problems in proving liability and establishing that there is a tortfeasor subject to suit. It is therefore likely that if such grievous damage occurs, Massachusetts may not only lack

an adequate remedy, but may well have no remedy at all. Interim equitable relief is the only means of affording it protection under our legal system.

We therefore submit that Massachusetts should not be exposed, against its will, to this grave risk to its economy and environment before this Court has ruled whether Massachusetts or the United States Government has the exclusive right to decide whether this exploration program should be set into motion at all.

In contrast to the danger to which the Federal Government intends to expose Massachusetts, the former will suffer no appreciable harm if a preliminary injunction were to be granted.

Several factors bear on this issue. The first is the time element. We are not seeking a preliminary injunction which would be of any prolonged duration. It should be noted that in the case at bar, the evidentiary proceedings before the Special Master have now been completd and this preliminary injunction will remain in effect only until this Court renders its decision.

The next factor is the Federal Government's contention that it needs to conduct explorations on this Continental Shelf area *pendente lite* in order to formulate a national energy policy. (Brief for the United States in Opposition to Motion for Preliminary Injunction by the Commonwealth of Massachusetts, pages 8 and 9, — filed June 1972). At that time, Massachusetts had moved the Court to enjoin seismic surveys by the Federal Government's licensee. Whatever validity that argument may have had at that time, we submit that it is severely attenuated by the fact that the Court refused to enjoin such seismic surveying *pendente lite*. An important and useful surveying method is therefore available *pendente lite* to the Federal Government in this area. We would also note that we have restricted our motion to only encompass drilling beyond

the depth of twenty-five feet, with the intent of avoiding unnecessary interference with the bottom sampling and "shallow" coring which has allegedly occurred from time to time. Massachusetts does not seek to enjoin mere technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment. We submit that since the Federal Government has at present complete freedom to conduct seismic surveys and "shallow" core sampling, the burden is on it to show convincingly that a delay in drilling merely until the outcome of this lawsuit (if it should prevail) will cause material and irreparable injury to a substantial national interest. In view of the considerable freedom of action the Federal Government presently enjoys, Massachusetts considers the sudden commencement of a radically deeper drilling program during the remainder of this lawsuit to be provocative, unnecessary, and unwise.

A recent case involving the issuance of a preliminary injunction against offshore drilling explicitly balanced the imminent threat of irreparable harm to the plaintiffs and the "energy crisis" argument advanced by the government, and resolved the issue decisively in favor of granting the preliminary injunction. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 165 (D.D.C. 1971), *aff'd.,* 458 F.2d 827 (D.C. Cir. 1972).

> The Court recognizes that there is a tremendous national energy crisis and that the Outer Continental Shelf has proved to be a prolific source of oil and gas. However, as President Nixon stated in his message to Congress on June 4, 1971, the Outer Continental Shelf "has been the source of troublesome oil spills in recent years." Furthermore, this area of the United States could be seriously harmed and contaminated by the

possible oil pollution resulting from all too frequent oil spills. 337 F.Supp. at 167.

Furthermore, in a related decision, it becomes apparent that the Federal Government had alleged a monetary loss ranging from $750,000 to $2,500,000 per month if the offshore drilling were halted by a preliminary injunction, but the court issued the injunction nevertheless, with only a nominal bond requirement. *Natural Resources Defense Council, Inc.* v. *Morton,* 337 F.Supp. 167 (D.D.C. 1971), *aff'd.,* 458 F.2d 827 (D.C. Cir. 1972).

We submit that the preliminary injunction granted in the *Natural Resources* case, *supra* (458 F.Supp. 165) is extremely significant to the relief sought in this motion. What was complained of by the plaintiffs in that case was non-compliance by the Federal Government with a statutory requirement for an adequate environmental Final Impact Statement. However, as the above quoted language shows, the actual irreparable harm against which the plaintiffs were afforded temporary protection was the danger of accidental oil release from offshore drilling, pending adjudication of the merits (on statutory compliance). We submit that it is also very significant that in that case, even if the plaintiffs had ultimately prevailed on the merits (that the Final Impact Statement was inadequate) this would not have given the plaintiffs the right to halt the drilling permanently, yet the preliminary injunction was granted nevertheless. In the case at bar, in contrast, Massachusetts, if it prevails on the ultimate dispute as to title, will have the exclusive right to determine whether the offshore drilling which it considers a grave threat shall be conducted at all in the future.

In the *Natural Resources* case, *supra,* (337 F.Supp. 167) the Court stressed the "public interest" aspect of the plaintiff's suit. We think this is very relevant to the

relief sought here. *Cf. West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232, 236 (1971).

Massachusetts moves the Court for this preliminary injunction because of a "public interest" motivation to halt a grave threat to its environment. We further contend that the plaintiff cannot argue that *pendente lite* it is relying on or enforcing a statute which furthers the public interest, and that this factor takes precedence over whatever good cause is shown by Massachusetts in support of its Motion. Massachusetts, as a state of the Union, is entitled to have its own viewpoint of the public interest given due weight until such time as the Court ultimately determines which governmental body shall have the right to make the pertinent value judgments.

C. *In Its Original Pleadings, Massachusetts Has Raised Serious Issues Going To The Merits Of This Case, And, Under The Applicable Equitable Doctrines, Is Entitled To A Preliminary Injunction.*

It is our contention that to justify the issuance of a preliminary injunction at this time, it is sufficient for Massachusetts to show that in its original pleadings, it has raised questions going to the merits which are serious and difficult, so as to render the issues raised proper for litigation and further deliberation. It is not necessary for Massachusetts to demonstrate that it will with reasonable certainty prevail upon a final hearing. *Unicorn Management Corp.* v. *Koppers Co., Inc.*, 366 F.2d, 199 (2d Cir. 1966). In *Bergen Drug Co., Inc.* v. *Parke, Davis and Co.*, 307 F.2d 725 (3rd Cir. 1962), the court held at 727:

> The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

As the court stated in *Unicorn Management Corp., supra*, a showing of reasonable certainty that the moving party will ultimately prevail is usually imposed only where the movant has failed to show irreparable damage. Thus, for example, in *Zugsmith* v. *Davis*, 108 F.Supp. 913 (S.D. N.Y. 1952) where the court denied a preliminary injunction because the moving party had not shown a reasonable certainty that it must succeed upon a final hearing, the court had also found that the moving party had not shown a lack of adequate remedy at law or immediately impending irreparable injury to it. The standard which we suggest as applicable here is set forth in a very recent environmental protection case. In *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971), a non-profit membership corporation sought a preliminary injunction to preserve the wilderness characteristics of a particular area. In affirming the granting of interlocutory relief by the district judge, the court pointed out that, while it was expressing no opinion on the merits of the issues raised, it could nevertheless say

> that their resolution is not immediately apparent. That is enough to say that [movant] has not embarked on frivolous litigation, and thus interlocutory relief is not improper if [movant] can also show a need for protection which outweighs any probable injury to [respondent]. 441 F.2d at 235.

We respectfully submit that the above discussed test can be met by Massachusetts here. The progress of this lawsuit shows that Massachusetts' claim to these exclusive exploration rights is not frivolous, but, rather, merits further consideration by this Court. In its Motion for Judgment filed with the Court in January of 1970, the plaintiff moved for judgment as prayed for in its Com-

plaint, on the ground that there was no genuine issue as to any material fact, and asserting that the United States was entitled to judgment as a matter of law. In its Brief in Support of Motion, the plaintiff argued on pages 18 and 19: "Accordingly, we believe the present motion is appropriate. If, after considering briefs and oral arguments by the parties... the Court should conclude that no State claim in the continental shelf beyond three miles is sustainable, the United States would be entitled to judgment.... If, on the other hand, the Court were to conclude that State claims beyond three miles in the Atlantic are legally tenable, two options would be open. The Court might well now resolve itself the ultimate validity and extent of such claims.... Or it might refer all or part of the remaining questions to a Special Master." The Court did in fact refer this case to a Special Master by its order of June 8, 1970. We would not presume to draw any inference from the Court's reference to a Special Master. We would, nevertheless, submit that it would be fair to infer that in the opinion of the plaintiff, the Court's reference is a prima facie indicia that state claims are "legally tenable," since the plaintiff stated that such a referral would be one of the two options available to the Court if state claims are "legally tenable." Therefore, at the very least until the Special Master submits his report to the Court, we argue that the plaintiff's demeanor and actions should be consistent with the assumption that the claim by Massachusetts to the exclusive right of exploration and exploitation is "legally tenable."

We have contended that as a general proposition of modern equity, under the proper circumstances, it is sufficient for the issuance of a preliminary injunction that the moving party, in its original pleadings, has raised serious and difficult questions going to the merits. This proposition, in support of which we have cited the above

cases, is buttressed by a more specific modern equity rule having particular application to the case at bar, since the latter concerns a title dispute.

What is at issue in this case is dominium, or *title*, to a particular geographical area. It is well settled that a preliminary injunction is available as an interim remedy to prevent injury to land, even though the title thereto be in dispute at law. A leading decision on this doctrine was handed down by this Court. *Erhardt* v. *Boaro et al.*, 113 U.S. 537 (1885).

> It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law.... This doctrine has been greatly modified in modern times and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. 113 U.S. at 538-39.

In the case at bar, the question as to which party shall ultimately prevail on the merits by having the authority to regulate continental shelf drilling (if it is to occur at all) is dependent simply upon which of the litigants shall prevail in the dispute as to the *title* to this area; we contend that, in the language of *Erhardt* v. *Boaro, supra*, "irremediable mischief" is being done or "threatened"

to the land in dispute. For, what Massachusetts is seeking to enjoin at this time is not merely a technical trespass in the form of the drilling of 1,000-foot deep holes; it is the threat of a major mishap which the drilling of these holes poses that constitutes "irremediable mischief" (See affidavit by Professor Zinn, attached hereto).

III. In The Event That The Court, In Its Discretion, Deems It Meet And Proper To Grant A Preliminary Injunction, Then Massachusetts Submits That A Bond Should Not Be Required.

We submit that the discretion of the Court as to whether to grant the temporary equitable relief sought should also incline it to dispense with the requirement of a bond, in the event that the Court grants our Motion.

Rule 9.2. of the rules of this Court provides that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions in this Court." Fed. R. Civ. P. 65(c) provides "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

We suggest that the aforestated provision exempting the United States from the requirement of providing security is an indication that this particular rule is one which cannot be applied in unmodified form in an original action in this Court; its application would not be "appropriate" within the meaning of rule 9.2. of this Court. The very rationale for the constitutional provision that actions

between a State and the Federal Government shall be subject to the original jurisdiction of this Court would be defeated if a rule of civil procedure for the lower court were to be applied so as to put the two parties on an unequal footing before this Court. Since the relevant rule of Federal Civil Procedure provides that no security shall be required of the United States, we suggest that it would be appropriate if Massachusetts, as a State of the Union before the Court on original jurisdiction, should likewise be exempt from the requirement of giving security as a prerequisite for the issuance of a preliminary injunction. For the reason above stated, we respectfully submit that this Court need not reach the issue of whether Rule 65(c) of the Federal Rules of Civil Procedure would require the giving of security by a private litigant under the present circumstances. However, we would like to point out that it has been held that the trial court has wide discretion as to the matter of a bond, and may dispense with this requirement entirely under the proper circumstances. *Ferguson* v. *Tabah*, 288 F.2d 665 (2nd Cir. 1961). Similarly, in *Urbain* v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1964), the court held that

> the failure of the District Court to require the prescribed security before issuing the restraining order is not reversible error. The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge. Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the District Judge to require bond of appellees. 217 F.2d at 815.

We maintain that the plaintiff will not be able to show that material damage will ensue to it if the preliminary injunction issues. Further, in *Continental Oil Co.* v. *Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964) the court held that no bond is necessary absent a proof of likelihood of harm. An important criteria that the court applied was that the movant was a corporation with considerable assets, and would, therefore, have been able to respond in damages if the party enjoined had suffered injury thereby. While we do not place the balance sheets of the Continental Oil Company and of the Commonwealth of Massachusetts in comparison here, we do, nevertheless, suggest that this dispensation granted a "corporation with considerable assets" be likewise granted to a State of the Union.

Finally, we would note, in discussing the discretion of the Court under Rule 65(c), that Massachusetts is acting to prevent damage to its environment. In the *Natural Resources* case, *supra* (337 F. Supp. 167) the court listed several recent cases where federal courts had interpreted their discretionary powers under Rule 65 (c) as permitting them to require only nominal bonds in such factual situations. The Court in *Natural Resources* set the bond at one hundred dollars, notwithstanding, as we have stated above, that the Federal Government had alleged monthly damages of up to two and a half million dollars. The court states (at 337 F. Supp. 169) "It would be a mistake to treat a revenue loss to the government the same as pecuniary damage to a private party."

Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction to preserve it from

serious and irremediable injury during the pendency of this action.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant
Attorney General
THOMAS J. CROWLEY
Assistant Attorney General
COMMONWEALTH OF MASSACHUSETTS

AUG 27 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 35 Original

Supreme Court, U.S.
FILED
OCT 15 1974
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA,

Plaintiff

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA and GEORGIA,

Defendants

Report of Albert B. Maris, Special Master

August 27, 1974

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

A. HISTORY OF THE PROCEEDING 1
1. The Basic Question Involved 1
2. Inception of the Litigation 1
3. Complaint of the United States 2
4. Answers of the Defendant States 3
5. Motion of the United States for Judgment and Reference to Special Master 5
6. Motion of State of Florida for Severance .. 6
7. Proceedings of the Special Master 7

B. MOTION OF THE UNITED STATES FOR JUDGMENT ... 8

C. DISCUSSION
1. Preliminary Considerations 21
2. English Law Prior to 1776 25
(a) Preliminary discussion 25
(b) English law before 1603 27
(c) English law during the Stuart period (1603-1688) 29
(d) English law after 1688 40
3. The American Colonial Charters 47
4. The Activities of the Colonies in their Adjacent Seas during the Colonial Period . 56
5. The Effect of Independence and the Ratification of the Constitution 60
6. The Post-1787 Period 65
(a) Recognition of the territorial sea .. 65
(b) The new continental shelf doctrine 68
(c) Validity of the Submerged Lands Act 71
7. The Individual Defenses of Rhode Island and North Carolina 73
8. The Individual Defense of Georgia 74
9. Request for Accounting 74

D. CONCLUSIONS 75

E. RECOMMENDED DECREE 82

F. APPENDIX 83
1. Consolidated and Revised Procedural Order as Amended 83

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 35 Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA and GEORGIA,
Defendants

Report of Albert B. Maris, Special Master

A. HISTORY OF THE PROCEEDING

1. THE BASIC QUESTION INVOLVED

The basic question involved in this litigation is whether the right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf underlying the Atlantic Ocean which is more than three geographical miles seaward from the coastline of the United States belongs to the United States or to the defendant States or any of them.

2. INCEPTION OF THE LITIGATION

The present litigation had its inception on April 1, 1969 when the United States filed in this Court a motion for leave to file a complaint against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New

York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, the 13 States bordering on the Atlantic Ocean. The jurisdiction of this Court was invoked under Article III, section 2, clause 2, of the Constitution of the United States and 28 U.S.C. §1251(b)(2). The State of Maine filed a brief in opposition to the motion, in which the other 12 States joined. The State of Virginia, in addition, filed a separate brief in opposition. On June 16, 1969 this Court granted the motion, 395 U.S. 955, and the complaint of the United States was formally filed.

3. Complaint of the United States

The complaint sets up separate causes of action by the United States against each of the 13 defendant States. It alleges that the United States was entitled prior to the enactment of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, to exercise, to the exclusion of the defendant States, sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the ordinary low-water mark and outer limit of inland waters on the coast to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources. It is further alleged that by the Submerged Lands Act the United States granted to the defendant States the title to and ownership of the submerged lands and natural resources lying in the Atlantic Ocean within their respective boundaries, but not extending seaward more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters. Nonetheless, asserts the complaint, the defendant States claim some right, title or interest adverse to the United States in the seabed and subsoil of the continental shelf more than three geographic miles seaward from their respective coastlines, and the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 3,300,000 acres of land submerged in the Atlantic Ocean

in the area in controversy. The complaint goes on to assert that the United States remains entitled, to the exclusion of the defendant States, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographic miles seaward from the coastline to the outer edge of the continental shelf for the purpose of exploring the area and exploiting its natural resources, that the United States is entitled to an accounting for all sums of money derived by the defendant States from that area which are properly owing to the United States, that by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 468, Congress declared "the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and to that end provided for the issuance of mineral leases in that area by the Secretary of the Interior to private operators, and that the defendant States are interfering with and obstructing the exploration, leasing and development of those mineral resources by the United States and will continue to do so to its great and irreparable injury, unless the rights of the United States are declared and established by this Court. In the case of Florida the complaint asserts that the Atlantic Ocean includes the Straits of Florida. The complaint seeks a declaratory decree and a direction for an accounting.

4. ANSWERS OF THE DEFENDANT STATES

All the defendant States filed answers. In addition, the State of Florida subsequently filed an amended answer. The answers differ somewhat in form but in essence they all deny the rights asserted by the United States. The answer of the State of Maine specifically admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain lands submerged in the Atlantic Ocean, some portion of which may be more than three geographic miles from its coastline, but denies that it has received

any sums from that area for which any accounting, even if due, could be made.

All the defendant States except the State of Florida assert by way of affirmative defense that as successors in title to certain grantees of the Crown of England (and, in the case of New York, also of the Crown of Holland) they are entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to their respective coastlines to the exclusion of any other political entity whatsoever, including the United States, subject only to the limits of national seaward jurisdiction established by the United States, that their power to exercise such dominion and control is not prohibited by the Constitution of the United States and has never been delegated to the United States, and that any attempt by the United States to assert such power with respect to the defendant States violates the Tenth Amendment to the Constitution and is void.

Additional defenses are asserted by certain of the States. Rhode Island asserts that it acquired *dominium* over the submerged lands and the waters of the Atlantic Ocean adjacent to its coastline by virtue of its declaration of independence from the British crown on May 4, 1776. The State of North Carolina asserts that in 1947 its General Assembly by statute declared that the eastern limit and boundary of the State on the Atlantic coast has "always been . . . one marine league eastward from the Atlantic seashore, measured from the extreme low water mark", that this declaration is based upon the provision in its 1868 Constitution that the "limits and boundaries of the State shall be and remain as they now are", which requires a determination of its original eastern boundary at the time of its entry into the Union in 1789. The State of Georgia alleges that any rights which the United States may have had in the disputed area were transferred to the State by the boundary settlement agreement of 1802.

The affirmative defense set up by the State of Florida is quite different from that raised by the other defendant States. In its amended answer it alleges that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State described in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coastline in certain parts of the Atlantic Ocean, and that Congress thereby granted to the State whatever interest the United States possessed in the maritime territory within those boundaries. The amended answer denies that the Straits of Florida are a part of the Atlantic Ocean and asserts that they are an arm of the Gulf of Mexico or, in the alternative, that the Florida Keys and the Marquesas and Dry Tortugas Islands are situated in the Gulf of Mexico and that the State is, therefore, entitled to a southern seaward boundary of three leagues from its coastline wherever located in this area.

5. MOTION OF THE UNITED STATES FOR JUDGMENT AND REFERENCE TO SPECIAL MASTER

On January 14, 1970 the United States filed a motion for judgment on the ground that there is in the litigation no genuine issue as to any material fact. On January 30, 1970 the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a joint motion submitting that the preferable course would be to refer the case to a master to take evidence, make findings of fact, conclusions of law and recommendations for a decree with special instructions to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question. The States of New York, New Jersey and Georgia subsequently filed similar motions.

This Court did not act on the motion for judgment, but on June 8, 1970 entered an order appointing the undersigned as special master in this case "with authority to fix

the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for." The order directed the master to submit such reports as he may deem appropriate. The specific directions requested by the States were not given, however. 398 U.S. 947.

6. MOTION OF STATE OF FLORIDA FOR SEVERANCE

On February 9, 1970 the State of Florida moved to sever the cause of action against it from those against the other 12 defendant States. On November 16, 1970 the motion for severance was referred to me as special master. 400 U.S. 914. On January 8, 1971 I granted Florida leave to file an amended answer and the amended answer was filed in this Court on February 4, 1971. On February 19, 1971 I held a hearing on the motion for severance. It was argued that the cause of action asserted against Florida presented factual questions applicable to that State alone and did not involve questions of either fact or law which were common to the other defendant States.

It appeared that in the case of *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida,* No. 9 Original, in which the rights of the State of Florida in the seabed off the Gulf coast of the State had been adjudicated, 1960, 363 U.S. 121, 364 U.S. 502, supplemental proceedings would be necessary to define more precisely the boundary of the State which delimited its seabed rights on that coast. It also appeared that if the proceedings against Florida in No. 35 with respect to the Atlantic coast were severed, it would be appropriate to consolidate them with the supplemental proceedings against Florida with respect to the Gulf coast, if authorized in No. 9.

Accordingly, on March 29, 1971, I filed a report recommending the severance and consolidation. On June 28, 1971 this Court entered orders granting the severance

and consolidating the severed cause of action with the supplemental proceedings which it authorized in No. 9. The consolidated proceedings were then designated as No. 52 Original, and were also referred to the undersigned as special master. 403 U.S. 949, 950.

In its amended answer filed prior to the severance Florida had alleged a counterclaim for money damages and had demanded a jury trial of the counterclaim. On March 29, 1971 the United States filed a motion to dismiss the counterclaim and deny the demand for a jury trial. On June 28, 1971 this Court referred that motion to me as special master, 403 U.S. 949. I held a hearing on the motion on October 22, 1971 and filed a report recommending that it be granted. On December 20, 1971 this Court adopted my report. 404 U.S. 998. Thereafter the consolidated case proceeded before the special master to completion. My final report as master in No. 52 Original was lodged with this Court on January 18, 1974 and ordered filed on February 19, 1974. 415 U.S. 905.

7. Proceedings of the Special Master

Following the reference to me of case No. 35 Original, I held prehearing conferences in Philadelphia with counsel for all parties on July 28, 1970, October 27, 1970 and January 8, 1971, and following each conference made an order embodying the agreements reached with respect to the procedure to be followed during the course of the proceedings. A further procedural order was made on May 24, 1971. To reflect the severance of the cause of action against the State of Florida from No. 35 Original, which had been ordered on June 28, 1971, and to consolidate the prehearing orders previously made into a single procedural order, on August 27, 1971 I made a consolidated and revised procedural order. On March 7, 1974 I amended paragraph 14 of that order. A copy of the consolidated and revised procedural order as amended is included as an appendix to this report.

Under date of February 8, 1971 the United States served a document entitled "First Formal Interrogatories" on each defendant State. Some of the defendant States answered these interrogatories but the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia filed, in common, objections thereto. On March 12, 1971 I made an order sustaining the objections because the interrogatories were not appropriate in view of the pre-hearing orders which had been made in the case.

Six separate sessions of hearings for the receipt of evidence were held in Philadelphia beginning May 24, 1971 and ending January 24, 1973, aggregating 14 hearing days. Ten witnesses were heard and approximately 1,260 exhibits were received in evidence. The transcript totals 2,800 pages. Throughout my labors I have been greatly aided by the able counsel who have conducted the case for the parties. Their thorough and painstaking work in the presentation of the evidence, both by way of documents and expert testimony and of exhaustive briefs of argument, has been most helpful to me. Their work has accorded to the highest standards of the profession and I wish to acknowledge it with gratitude.

B. THE MOTION OF THE UNITED STATES FOR JUDGMENT

As we have seen, the United States early in this litigation filed with this Court a motion for judgment on the ground that there is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law. That motion was, however, not then acted upon by the Court which, instead, pursuant to motions by the defendant States, referred the proceeding to me as special master to direct subsequent proceedings, take evidence and make report thereon. I have assumed that this action by the Court was not intended to be con-

strued as a denial of the motion for judgment but rather as an indication of the Court's desire for a full development of and report on the facts in the light of which to consider the issues involved. This was doubtless in accord with the established policy of the Court in controversies of this magnitude between the federal government and the sovereign states. *United States v. Texas*, 1950, 339 U.S. 707, 715. I shall accordingly later in this report consider the evidence offered by the parties and make findings with respect to the facts established thereby. At the outset, however, I deem it incumbent upon me to consider the merits of the motion for judgment.

The motion is based upon the proposition that this Court in *United States v. California*, 1947, 332 U.S. 19; *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, determined that the United States, rather than the States involved, as an attribute of national sovereignty had paramount rights in the submerged lands and natural resources of the territorial sea, seaward of the coastline, that these cases have not been overruled or their authority impaired by subsequent decisions of the Court, that the rule which they lay down applies to all the coastal states, and that it applies with even greater force to the seabed and subsoil of the continental shelf lying seaward of the three-mile limit of the territorial sea. The defendant States urge, on the contrary, that both the reasoning and result of the *California*, *Louisiana* and *Texas* cases have been repudiated by Congress and by subsequent decisions of this Court. They argue, moreover, that those cases were in any event wrongly decided and should now be overruled. It may well be, as the defendant States urge, that this Court, in granting the reference to a special master for a fact finding inquiry, indicated its willingness to reopen and review the issues decided by the *California*, *Louisiana* and *Texas*

cases. However that may be, it is obviously for the Court rather than its special master to undertake such a review. It is for me, as I understand my role, to apply to the facts of this proceeding the law as it now exists, not as the defendant States would like to see it revised. I pass, therefore, to the consideration of the *California*, *Louisiana* and *Texas* cases.

In *United States v. California*, 1947, 332 U.S. 19, this Court was called upon to determine the respective rights of the State and the federal government in the seabed and subsoil of the three-mile belt of marginal sea off the coast of California. California contended that the three-mile marginal sea was within the original boundaries of the State approved by Congress, that the 13 original states had acquired from the English crown ownership of all lands under the navigable waters within their respective boundaries including all lands under the sea within at least three miles of their respective coasts and that California was entitled under the Constitution to stand in this regard on an equal footing with the original states. This Court rejected the contentions of California. After reviewing a multitude of cited documents,* consisting of a great many, but not all, of those included in the present record, it held that the equal footing doctrine did not support the State's claim because the 13 original states had not themselves acquired as colonies and did not separately own the natural resources of the seabed of the adjacent territorial sea. The Court said [pp. 31-34]:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen

* Neither party suggested any necessity for the introduction of evidence. [332 U.S. at p. 24]

original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See

> *The Queen v. Keyn*, 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones v. United States*, 137 U.S. 202, 212-214; *In re Cooper*, 143 U.S. 472, 502-503."

Both because acquisition of the territorial sea had been accomplished by the national government rather than by the states and because the territorial sea was primarily affected by national concern for defense, international relations, and foreign commerce, the Court held that rights in the submerged lands and resources of the territorial sea, unlike those in inland navigable waters which belonged to the states under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, should be considered attributes of national sovereignty rather than of state sovereignty. The Court concluded [pp. 38-39]:

> "Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

In *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, this Court followed and applied the rule of the *California* case. In the *Louisiana* case the State sought to differentiate its case from that of California because a Louisiana statute of 1938 had purported to extend the State's boundary seaward 27 miles from the shoreline. This Court rejected the distinction, saying [p. 705]:

> "We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis a vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem."

It pointed out that the predominance of national interests over state interests increases rather than diminishes as one moves farther seaward, saying [pp. 705-706]:

> "If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil."

Texas likewise sought to differentiate its case from that of California. It asserted that prior to its admission to the union as a state, it had been an independent republic which by statute claimed a three-league marginal sea where it exercised all the elements of external as well as domestic sovereignty. This Court rejected that distinction also, holding that when Texas became a state of the union, it necessarily did so on an equal footing with the original states, so that its relinquishment of national sovereignty to the federal government carried with it all the attending attributes of that sovereignty, including paramount rights in the submerged lands and resources of the marginal sea.

The rule laid down by the *California* case that the

federal government has rights in the seabed and its resources underlying the territorial sea which are paramount to any rights claimed by the states is, I believe, based upon two grounds. The first and, as it seems to me, the most fundamental ground is that since the territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the "protection and control of it has been and is a function of national external sovereignty" [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and that an incident to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea. It is true, of course, that the Court also relied in this regard on its finding that the concept of a territorial sea arose and gained international acceptance after the formation of the union and largely as a result of the efforts of the federal government.

The other ground upon which this Court relied in the *California* case was that California's claim to rights in the seabed of the territorial sea was not supported by its reliance upon its Enabling Act, 9 Stat. 452, under which it was admitted into the union "on an equal footing with the original States in all respects whatever", since, on the basis of the historical material submitted to it, the Court concluded that the 13 original states did not as colonies separately acquire ownership of the three-mile belt or the soil under it. It is true, of course, as the defendant States argue, that this finding, which if adhered to by this Court would effectively foreclose against the present defendant States the factual issues raised by them in the present proceeding, does not bar their claims here under the doctrine of *res judicata* for they were not parties to the *California* case and did not intervene in that case. I note, however, that the States of Massachusetts, New Jersey and New York did participate, directly or indirectly, as *amici curiae* in that case. Also many of the historical documents,

although admittedly not all, which have been introduced as exhibits in this proceeding were before this Court in the *California* case. Accordingly, it appears to me that while litigation of the issues of fact raised by the affirmative defenses of the defendant States in the present proceeding is not barred by the doctrine of *res judicata*, the rule of law laid down in the *California*, *Louisiana* and *Texas* cases is applicable to the present case under the doctrine of *stare decisis* unless it has been modified or overruled by later decisions or legislation. I note that in footnote 140 to its opinion in the second *Louisiana* case, *United States v. Louisiana et al.*, 1960, 363 U.S. 1, 83, this Court said with respect to the defense of the State of Mississippi, one of the defendant States in that case:

> "140. On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. The Submerged Lands Act, passed in 1953, by which parts of those lands were relinquished to the States, also forgave any monetary claims arising out of the States' prior use of the lands so relinquished. But the United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished.
>
> "Mississippi contends that it is not liable for an accounting, since it was never party to a suit decreeing the United States' rights in offshore lands. However, principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States, and Mississippi was put on notice by the decrees in those cases."

An examination of the later decisions of this Court satisfies me that the rule of the *California*, first *Louisiana* and *Texas* cases has not been overruled or impaired. On

the contrary, this Court in the second Louisiana case, 1960, 363 U.S. 1, stated in its opinion [p. 7] that the rule of those cases is "admittedly applicable to all coastal States" and in footnote 140 to that opinion, as we have seen, that the "principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States". The defendant States urge that in the second *Louisiana* case and in *United States v. Florida*, 1960, 363 U.S. 121, this Court modified the rule of the *California* case when it approved the claims of Texas and Florida to state boundaries three marine leagues seaward from the coastline, qualifying them for ownership of the seabed and its resources within those limits under the provisions of the Submerged Lands Act. By this action, they argue, the Court indicated that it no longer regarded seabed rights as inseparable from the external sovereignty of the federal government over the surface. I do not agree with this analysis, finding nothing in the *California*, first *Louisiana* or *Texas* cases to support the basic premise underlying the defendants' argument. It is true that this Court in the *California* case said that dominion over the resources of the soil under the water of the territorial belt of the sea is an incident of the paramount rights of the federal government in that belt of the sea. But the Court did not indicate that the federal government by Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs. Moreover, this Court's discussion in the *California* case [332 U.S. at p. 38] of the case of *Skiriotes v. Florida*, 1941, 313 U.S. 69, indicated that it recognized that a riparian state might have an interest in a resource of the territorial sea, in that case the sponge fishery, with which it might deal in the absence of conflicting federal legislation and, I would add, *a fortiori*

when expressly so authorized by federal legislation such as the Submerged Lands Act. And I may also add that this Court has recently made it quite clear that a coastal state under its police power may legislate in furtherance of its special concern with respect to oil spillage in its territorial waters. *Askew v. American Waterways Operators, Inc.*, 1973, 411 U.S. 325.

This brings me to consider the Submerged Lands Act which was approved May 22, 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., following the decisions of this Court in the *California*, first *Louisiana* and *Texas* cases. The defendant States strongly argue that by the Act Congress repudiated the underlying basis of the decisions in those cases which, they assert, was that ownership of the seabed of the territorial sea was required to be vested in the federal government in order to enable it to carry out its responsibilities in conducting the foreign affairs and defense of the nation. As I have already indicated, however, I do not read the cases in question as so holding. It is true that many riparian states had previously assumed that they did have rights in the territorial sea and its seabed resources adjacent to their shores under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, and that a great deal of opposition to the California decision developed, culminating in the enactment of the Submerged Lands Act. It is also true that in the Congressional committee reports on the bill which became the Act the decision was strongly criticized as out of line with decisions of the past and it was indicated that the purpose of the bill was "to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution." S. Rep. No. 133, 83d Cong., 1st Sess., p. 8. The background and legislative history of the Act are discussed at length by this Court in the second *Louisiana* case, 1960, 363 U.S. at pp. 17-24.

This Court in the second *Louisiana case*, 1960, 363 U.S. 1, 8-10, summarized the provisions of the Submerged Lands Act as follows:

> "The purposes of the Submerged Lands Act are described in its title as follows:
>
> > " 'To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.'
>
> "To effectuate these purposes the Act, in pertinent part—
>
> "1. relinquishes to the States the entire interest of the United States in all lands beneath navigable waters within state boundaries (§ 3, 43 U.S.C. § 1311);
>
> "2. defines that area in terms of state boundaries 'as they existed at the time [a] State became a member of the Union, or as heretofore approved by the Congress,' not extending, however, seaward from the coast of any State more than three marine leagues in the Gulf of Mexico or more than three geographical miles in the Atlantic and Pacific Oceans (§ 2, 43 U.S.C. § 1301);
>
> "3. confirms to each State a seaward boundary of three geographical miles, without 'questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress' (§ 4, 43 U.S.C. § 1312); and

"4. for purposes of commerce, navigation, national defense, and international affairs, reserves to the United States all constitutional powers of regulation and control over the areas within which the proprietary interests of the States are recognized (§ 6(a), 43 U.S.C. § 1314); and retains in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf (§ 9, 43 U.S.C. § 1302)."

Justice Harlan, speaking for this Court in the second *Louisiana* case, epitomized the Congressional intent reflected by the Act, as follows:

"By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." 363 U.S. at pp. 6-7.

It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case. For although that rule was announced with respect to the seabed of the three-mile territorial belt of sea, which was the only area involved in the *California* case, its rationale applies *a fortiori* to the area of the sea beyond that belt as this Court specifically pointed out in the first *Louisiana* case, 339 U.S. 699, 705.

What has been said is applicable, as well, to the special defenses raised by the States of Rhode Island and North Carolina to which I have already referred. The special defense raised by the State of Georgia requires further comment, however. That defense is that any rights of the United States in the seabed off the Georgia coast were transferred to the State by the boundary settlement

agreement of April 24, 1802 between the United States and the State of Georgia. The 1802 agreement was negotiated and signed by federal and state commissioners pursuant to the Acts of Congress of April 7, 1798, 1 Stat. 549, and May 10, 1800, 2 Stat. 69, and the Georgia Act of February 15, 1799, Digest of the Laws of Georgia (1801) p. 726. These federal statutes empowered the federal commissioners to make a final settlement of the conflicting claims of the United States and Georgia to lands west of the Chattahoochee River, and other lands claimed by Georgia, upon such terms as to them should appear reasonable. The Georgia Act required that the United States extinguish Indian title to certain lands in Georgia and cede those lands to the State.

The agreement ceded to the United States the lands west of the Chattahoochee River in exchange for certain undertakings by the United States. These included payments to be made from the proceeds of the ceded lands, extinguishment of Indian titles in Georgia and cession to Georgia of the claim, right or title of the United States to the jurisdiction or soil of any lands "lying within the United States" south of the southern boundaries of Tennessee, North Carolina and South Carolina and east of the western lands ceded to the United States by the agreement. Neither the federal commissioners in submitting the agreement to the President, nor the President in submitting it to Congress, gave any hint that it was the purpose to cede to Georgia any federal rights in the seabed. [Ga. Ex. 8] Lands beneath navigable waters, unless they are granted in specific terms, are deemed to remain attached to the sovereignty to which by their nature they appertain. *Martin v. Waddell*, 1842, 16 Pet. 367; *Massachusetts v. New York*, 1926, 271 U.S. 65. In the case of the seabed beneath the ocean seaward of the coastline this Court has held that sovereignty to be the national government, not the coastal state. *United States v. California*, 1947, 332 U.S. 19. But even if it were assumed, although

I find no basis for doing so, that by the agreement of 1802 Georgia received title to the seabed off its coast this would not sustain Georgia's claim. For it could not be held that such title extended out into the area here in controversy, since no one contends that in 1802 the United States claimed any jurisdiction over or title to the seabed of the continental shelf beyond the three-mile belt of territorial sea.

I conclude that the rule announced in the *California*, first *Louisiana* and *Texas* cases and approved and declared to be applicable to all coastal states by the second *Louisiana* case, 363 U.S. 1, 7, remains in full vigor and applies to all the defendant States in this proceeding, foreclosing the issues of fact raised by them and requiring as a matter of law the entry of judgment for the United States on its motion. This conclusion is, of course, subject to the possibility that this Court, as urged by the defendant States, may decide to reconsider the rule laid down by the *California*, first *Louisiana* and *Texas* cases in the light of the facts developed by the parties in the present proceeding. I, therefore, proceed to the consideration of those facts.

C. DISCUSSION

1. Preliminary Considerations

Basic to the case of the defendant States is their contention that this Court erred in its finding in the *California* case [332 U.S. at p. 31] that the 13 original colonies did not separately acquire ownership to the adjacent sea or the soil under it, even if they did acquire elements of the sovereignty of the English crown by their revolution against it, and [332 U.S. at p. 32] that neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document submitted to this Court, showed a purpose to set apart a three-mile belt of marginal sea for colonial or state ownership. They further contend that this Court erred in holding [332 U.S.

at pp. 32-33] that there is no substantial support in history for the idea that the colonists wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth. On the contrary, the defendant States have sought to prove in the present case:

(1) that English law and practice prior to and during the seventeenth and eighteenth centuries recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof and was not inconsistent with the international law of the period;

(2) that the American colonial charters created territorial seas and conveyed maritime sovereignty and dominion;

(3) that rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period;

(4) that at the American revolution the states individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown, and those rights were retained by them after the adoption of the Constitution; and

(5) that the exclusive rights of the states to the continental shelf have not been abandoned or extinguished since 1787.

In addition, the defendant States have introduced evidence which, they assert, establishes the invalidity of the conclusion of this Court in the *California* case [332 U.S. at pp. 34-36] that the exercise of sovereign powers granted to the federal government in the fields of foreign commerce, foreign affairs and national defense requires that the federal government have dominion over the marginal sea and rights to its seabed which are paramount to any claims of the states. They point to the opinion of their expert witness, Professor Lyman B. Kirkpatrick, Jr.,

that upholding the claims of the states would not inhibit or embarrass the federal government in carrying out its foreign affairs and defense responsibilities. However, I do not regard the conclusion in question to have been based upon a factional evaluation by this Court of the relative needs of the federal government in these areas as against the claims of the states. On the contrary, it appears to me to represent the statement of a purely legal principle, namely, that since the Constitution has allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea. How those rights are to be exercised and by what entities in our federal system is, of course, a question of public policy for the Congress to decide, as it did by the Submerged Lands Act.

The principle is based, I believe, upon the inescapable physical fact that the sea is affected by the interests and activities of other nations in a very different way, and very much more directly and immediately, than is the land, and that the existence and preservation of our national rights in the marginal sea are largely dependent upon the ability of the federal government to carry out its responsibilities in the fields of foreign commerce, international relations and national defense. The land is in no sense comparable to the sea in this respect. For aliens may be, and frequently have been, wholly excluded from the land, whereas the sea, including the marginal sea, has been used by all the maritime nations of the world as a common avenue of commerce and a common source of fishing since the dawn of history. I should add that since this Court has thus held in the *California* case that the United States is vested, as a matter of constitutional law, with dominion over the marginal sea including paramount rights in the resources of the seabed, I do not regard it as within my province to question the ruling as the defendant States

ask me to do. If the ruling is to be departed from it is for the Court to do so and it would be presumptuous on my part as its special master to suggest such action.

Upon the questions of fact and of English and international law raised in the case a great deal of expert testimony and a large number of documents have been offered in evidence by the parties. From the consideration of this evidence, much of it conflicting, and of relevant matters of which judicial notice may be taken, I have made the findings of fact which appear as statements of fact in this report. In my discussion of these facts and of the questions of law involved I shall not attempt to discuss, or even mention, all the documents upon which the parties rely, since to do so would lengthen this report inordinately and unduly delay its completion. I shall confine myself in most instances to discussing only those which I regard as particularly significant or controlling.

In considering the facts it is important to bear in mind what is, and what is not, involved in this case. The sole question which is involved is whether the United States or the respective defendant States have the right to the exclusion of the other to explore and exploit the natural resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of the territorial sea adjacent to the Atlantic coast. The case is not directly concerned with the question whether prior to the enactment of the Submerged Lands Act of 1953 the defendant States had jurisdiction over, title to or ownership of the seabed and subsoil of the continental shelf within the three-mile belt of territorial sea or the exclusive right to explore and exploit the resources of the seabed and subsoil in that area. For as to this question the Submerged Lands Act has "recognized, confirmed, established, and vested in and assigned to" the defendant States, *inter alia*, "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States [which the Act limited to a distance of three geographical miles from

the coastline and confirmed at that distance in the case of the original coastal states], and the natural resources within such lands and waters". It will be recalled that section 9 of the Submerged Lands Act provided that the Act should not affect the rights of the United States to the natural resources of that portion of the seabed and subsoil of the continental shelf lying seaward and outside of the area confirmed to the states by the Act and it expressly confirmed the jurisdiction and control of the United States over those natural resources. It will also be recalled that the jurisdiction and control of the United States over the seabed and subsoil of that portion of the continental shelf lying seaward of the area confirmed to the coastal states by the Submerged Lands Act was, shortly thereafter, expressly claimed by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331 et seq.

I proceed, therefore, to consider the facts which are relevant to the question whether the defendant States have any right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf lying beyond the three-mile limit, which have survived the enactment of the Submerged Lands Act.

2. English Law Prior to 1776

(a) *Preliminary discussion*

Our discussion begins with the English law of the sea in the centuries before 1776. On this subject the expert testimony of distinguished legal historians was offered by the parties together with a multitude of documents. This testimony as to the course of the English law and as to the significance of the documents relating thereto which are in evidence was sharply conflicting in a great many respects. I have accordingly tested the evidence and exhibits by what I believe to be the most reliable account of the history of the English claims to sovereignty of the sea in the period under discussion, namely, the work of

the English scholar, Professor T. Wemyss Fulton, *The Sovereignty of the Sea* (1911). Judge Philip C. Jessup, the eminent scholar and jurist called by the defendant States as a witness, in his treatise *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 10, states that Fulton's work sets forth in admirable detail the history of the early British pretensions from Anglo-Saxon days through the eighteenth century. Similar approval of Fulton's work appears in Wade's Introductory Essay to Boroughs, *The Soveraignty of the British Seas* (1633, Wade ed. 1920) p. 14, note 1; Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 57, note 1; Brownlie, *Principles of the Public International Law* (1966) p. 208, note 3; and Colombos, *The International Law of the Sea* (6th ed. 1967) p. 48, note 2. The expert testimony which I have found persuasive in the light of my own study of the documents in evidence and of the judicial decisions and public acts to which I have been referred, confirmed and supplemented by the work of Fulton and other scholars, supports the findings and conclusions which follow with respect to the older [i.e. 1200 to 1600] English tradition of sovereignty of the sea, as well as the developments in that regard in the seventeenth and eighteenth centuries.

Although according to the Roman law the sea was common and free to all, in the middle ages certain seas had become more or less effectively appropriated. This took place among the early Italian republics with respect to the Adriatic, Ligurian and Tyrrhenian Seas, and with Denmark, Norway, Sweden and Poland with respect to parts of the North and Baltic Seas. Still more extensive were the claims asserted by Spain and Portugal, which in the sixteenth century sought to divide the great oceans between them. It was those pretensions to the immense waters of the globe which gave rise to the juridical controversies involving the concepts of *mare clausum* and *mare liberum* from which the modern law of the sea arose, and which led Queen Elizabeth I in 1580 to inform

the Spanish ambassador that "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof."*

In seeking to appropriate their adjacent seas, maritime states were doubtless impelled by consideration of their own immediate interests. But there is also a less selfish explanation. After the breaking up of the Roman empire, pirates swarmed the sea lanes. The seas were then common in the sense of being universally open to depredation. At first associations of merchants and later maritime states began policing the neighboring seas in the exercise of a protective admiralty jurisdiction. By the thirteenth century this jurisdiction came to be regarded as a prerogative of sovereign power.

(b) *English law before 1603*

There is good reason to believe that the English claims to sovereignty of the sea originated in this way through the exercise of jurisdiction by the English admirals to keep the peace and security of the sea and to protect commerce and navigation thereon. The sovereignty thus claimed did not involve, prior to the Stuart era, the concept of property rights in the high seas, however, and it had but little international importance.† The long-continued English insis-

---

* Camden, *Annales* (ed. 1635) 225 [quoted in Fulton, *The Sovereignty of the Sea* (1911) p. 107]. Bracton on the Laws and Customs of England, II Thorne ed. (1968), pp. 39-40.

† Fulton, *The Sovereignty of the Sea* (1911) p. 9. It is stated in Holdsworth, I *History of English Law* (3d ed. 1922) p. 550, that "after 1363 the Admiral's criminal jurisdiction was recognized as exclusive on the high seas. This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship whether subjects or not, and over any one in cases of piracy at common law. It could be exercised over no other persons."

tence that a foreign vessel meeting one of the king's ships should lower its sail and strike its flag, which was known as the right of the flag, and which was first demanded by ordinance of King John in 1201, seems to have been required to enable the king's officers, who were patrolling the sea in order to maintain the security of navigation, to ascertain the true nature of the foreign vessel, whether it was a peaceful trader or a pirate.* The jurisdiction of the admirals continued, under the Plantagenet and Tudor monarchs, to be exercised over English subjects and ships on the high seas and for the protection of commerce in what was frequently described as the Sea of England or the narrow sea, but there is no evidence that that sea extended far from the coast or that the jurisdiction exercised therein differed from that exercised by other maritime states in their adjacent waters. The ordinance of 1201 and the admiralty records of those early times were, however, cited by Selden and others in the Stuart period as proving that the crown had always possessed the sovereignty of the sea. But beyond the protective jurisdiction which I have described, which was doubtless exercised in the Straits of Dover and perhaps in the remainder of the English Channel at times when the coasts of France were in the possession of the English crown, there is little evidence to prove that any such claim was made by the crown prior to the accession of the Stuart kings. Moreover, there were long periods of time when nothing was heard of any English pretension to a special sovereignty of the adjacent sea. Evidence of any appropriation of the sea is lacking. No tribute was levied on foreign ships passing through the Channel or the narrow seas. Nor were the sea fisheries appropriated in those days, the people of all nations being at liberty to fish on the English coast. Bracton and other writers of this early period made no claim of such an exclusive right.†

---

* Fulton, *The Sovereignty of the Sea* (1911) p. 7.

† Fulton, *The Sovereignty of the Sea* (1911) pp. 65-66.

An exception to the freedom of fishing was the claim of the crown to certain large fish, including whales, taken in the adjacent seas, which were denominated royal fish. These were claimed by the crown under its prerogative. There is also evidence that the crown early claimed under its prerogative the right to wreck, treasure trove, flotsam, jetsam and lagan, and to derelict or emerged lands. But these crown prerogatives were not based in pre-Stuart times on any claim to the ownership of the seabed. Until the publication in 1569 of a treatise by Thomas Digges,* the latter claim appears never to have been suggested in any contemporary legal literature. Digges' purpose was to establish the right of the crown to the foreshore and to derelict or newly emerged lands. And although he suggested that the crown was entitled to such lands because of its ownership, which he assumed, of the seabed, he also indicated that the crown owned such lands when they arose by virtue of its prerogative right to appropriate ownerless property. I find the latter to have been the prevailing doctrine and it was also the basis for the crown's prerogative right to wreck, treasure trove, flotsam, jetsam and lagan. The crown's prerogative right to royal fish was also based upon its right to ownerless property, not on any concept of territorial jurisdiction. I am unable to find that in the older legal tradition of the pre-Stuart period it was thought that the prerogative of the crown or its sovereignty over the adjacent seas involved any property right to the seabed or to its resources prior to their actual appropriation as ownerless property.

(c) *English law during the Stuart period (1603-1688)*

Upon his accession in 1603 James I, who was king of Scotland, brought with him the Scottish policy which

---

* The treatise is set out in Moore, *A History of the Foreshore and the Law Relating Thereto* (1888) pp. 185 et seq. [Me. et al. Ex. 203].

aimed at the monopolization of the fisheries.* In support of this policy there arose the political concept of the "British Seas" and James revived the fading claims of the crown to sovereignty over those seas.† James caused the bays along the English coasts, called the "King's Chambers", to be delimited. These were neutral areas within which hostile acts of belligerents were prohibited. And he laid claim to the exclusive right to the fisheries along the English, Scottish and Irish coasts.‡ This claim involved especially the rich herring fisheries of the North Sea off the east coasts of England and Scotland. These fisheries had long been exploited by the Dutch and the latter resisted the English claims. Between 1652 and 1674 three wars were fought between the English and Dutch, in which the right of fishing was one of the issues involved. The last of these wars ended in 1674 and left the Dutch with access to the fisheries in controversy without further hindrance from England.

During the reign of Charles I (1625-1649) the claims of the English crown to the sovereignty of the seas reached their most extravagant proportions. Charles claimed absolute sovereignty, to the exclusion of all foreign fleets

---

* This claim to exclusive fishing rights was in direct opposition to the policy which had prevailed in the older English tradition of freedom for all nations to fish on the English coasts. Fulton, *The Sovereignty of the Sea* (1911) p. 57.

† Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 59; Brownlie, *Principles of the Public International Law* (1966) p. 208.

‡ This claim was made in the proclamation of James I issued May 6, 1609 which gave notice that no person who was not a British subject would be permitted after July, 1609 to fish upon "any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adjacent" without having first obtained a royal license to do so [Me. et al. Ex. 221]. This requirement of a license for aliens to fish in the British Seas was renewed by proclamation of Charles I issued May 10, 1636 [Me. et al. Ex. 222].

and men of war, over the high seas clear across to the coasts of the continent. He asserted that these seas were under his protection as Lord of the Seas and all foreign vessels meeting one of the king's ships in his seas were to accord it the right of the flag. These claims were being made in a period of greatly expanding commercial enterprise. The European powers, especially the Dutch, were pushing into every sea for the sake of traffic and gain. The Dutch legal scholar, Hugo Grotius, had written his great work, *Mare Liberum*, in 1609 defending the concept of the freedom of the sea. Charles obviously needed legal support for his far-reaching claims. In 1618 the eminent English scholar, John Selden, had written *Mare Clausum*, a reply to *Mare Liberum*, and a defense of the claims of the English crown to sovereignty of the seas. The work remained unpublished until 1635. In that year, at the request of Charles I, Selden recast, enlarged and published his treatise. It was a work of immense scholarship and although, as later scholars have shown, it was based to a considerable extent on dubious readings of the history and documents of pre-Stuart England, it became perhaps the most authoritative and frequently-cited work on the subject during the remainder of the Stuart era.

Charles I sought to enforce by naval power sovereign jurisdiction over the wider seas which he claimed, using the famous "ship money fleets" for the purpose. During this period the courts of admiralty continued to exercise jurisdiction over English ships and English subjects anywhere on the high seas. In addition to the prevention of piracy and the protection of British subjects and property, jurisdiction was also exercised to exclude unlicensed foreign fisherman from the English seas, to enforce other measures regulating the fisheries and to deal with the failure of foreign vessels to accord the right of the flag to the king's ships. The defendant States assert that this jurisdiction was territorial in nature. I do not find any evidence, however, that the admiralty courts claimed

jurisdiction to try all crimes committed on the English seas such, for example, as the murder of one foreigner by another on board a foreign vessel. Thus their jurisdiction was not territorial in the sense in which the common law courts exercised territorial jurisdiction on land. Moreover, it appears that in the seventeenth century the common law courts were attempting to impose limitations upon the traditional jurisdiction of the admiralty courts. Much of the legal writing of this period was, therefore, in the nature of argument in defense of that jurisdiction. In the case of *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved decided in 1876 that the English courts of admiralty did not have territorial jurisdiction to try a foreigner for a crime committed on a foreign ship on the high seas even though the ship at the time the crime was committed was within what had then become recognized as the three-mile belt of territorial sea. Lord Chief Justice Cockburn in his scholarly opinion in that case demonstrated that the courts of admiralty had never up to that time had such jurisdiction.* I am clear that the evidence offered by the defendant States is not sufficient to rebut the correctness of this decision. I conclude that the jurisdiction of the English courts of admiralty in the seventeenth and eighteenth centuries was not based upon a territorial concept.

In the seventeenth and eighteenth centuries the crown continued to exact the right of the flag from foreign vessels passing the king's ships in the adjacent English seas. This was, of course, in a certain sense an exercise of sovereign power in those seas. But in the treaty

---

* In doing so he analyzed [1876-77 L.R. 2 Exch. Div. at pp. 163-167] the eight early cases cited by Hale in 2 *Pleas of the Crown* (1778 ed.) pp. 12-13 [Me. et al. Ex. 467] and demonstrated that they did not support Hale's statement, upon which the defendant States rely, that "the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties."

of 1674, which ended the third Dutch war, it was agreed that while the Dutch were to continue to accord the right of the flag it was to be merely as a ceremony of honor and a testimony of respect to the English crown. Thus as time wore on this practice lost its original importance and became merely a matter of form and it was wholly abandoned after the battle of Trafalgar in 1805. At bottom it was based on naval power and not, I believe, upon any claim of the right of ownership of the sea.

The right of the crown to emerged or derelict lands, wreck, treasure trove, flotsam, jetsam and lagan continued to be asserted in the seventeenth and eighteenth centuries. While emerged or derelict lands were still claimed by the crown under the prerogative as ownerless property, under the Stuart kings the claims came more and more to be based also upon the crown's asserted ownership of the seabed of the seas over which it claimed dominion. The defendant States cite a number of English cases and treatises of the period which take this view and which tend to support their contentions that in the seventeenth century it was generally assumed to be established English law that the crown owned the seabed and subsoil of the English seas and the resources thereof. Perhaps the most important of these is John Selden's *Mare Clausum* (published in 1635) to which I have already referred, which was written, in part at least, to justify the claim of the crown to the fisheries of the British seas. In that work Selden was responding to the theory of the freedom of the seas espoused by Grotius in his *Mare Liberum* (1609), and he took the view that the sovereignty of the crown over the English seas involved its ownership of their seabed and the sedentary fisheries, i.e., oysters, pearls, coral and the mineral resources thereof. These rights of ownership he referred to, in conventional terminology, as the crown's royalties or regalia.

Selden's *Mare Clausum* was followed, *circa* 1667, by Sir Matthew Hale's treatise *De Jure Maris* which along

with *Mare Clausum* was one of the most frequently cited works on the English law of the sea of the period of English history with which we are concerned. *Mare Clausum* and *De Jure Maris* were undoubtedly accepted as authoritative by generations of English judges and lawyers and were continually relied upon, at least during the seventeenth century, in support of proclamations, judicial decisions, legal opinions and other public documents dealing with the subject. I think it is correct to say, however, that most of these were concerned with the fisheries, the jurisdiction of the admiralty courts and the right of the flag, none of which directly involved ownership of or rights in the seabed. But there were also some cases involving emerging or relicted lands or newly arisen islands, which did directly involve land which had formerly been in the bed of the sea.

In *De Jure Maris* Hale stated [Hargrave, 1 Law Tracts, Me. et al. Ex. 194, p. 10]:

> "The part of the sea which lies not within the body of a county, is called the main sea or ocean.
>
> "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not.
>
> "This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum*; and therefore I shall say nothing therein, but refer the reader thither.
>
> "In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with."

Hale goes on to say [pp. 11, 12, 14] that the king's right of propriety or ownership in the sea and soil thereof is evidenced principally by two things, the one his right of

fishing in the sea and the other his right to the foreshore and to the increase of land from the sea by alluvion, by reliction and by the arising of islands. The king's right to these increases of land from the sea Hale based upon the fact that the soil of the sea from which they arose belonged to the crown as part of its waste or demesne. I think, therefore, that it must be concluded that by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland. These rights were based upon the claim that the narrow seas were under the dominion of the British crown and not, as the defendant States urge, upon the theory that they were within the realm of England. For the realm of England was limited to the area within the bodies of the English counties to which the common law was applicable and did not extend beyond low-water mark into the sea, the area with which the admiralty courts dealt.*

The prerogative right to the seabed was limited to those portions of the narrow seas of which the crown was in effective occupation through its naval power. For as Hale goes on to point out [pp. 31-32]:

> "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. . . .

---

* Finch, *Law, or, a Discourse Thereof*, 1613, (Pickering ed. 1759) pp. 77-78; *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, 197-198.

> "The civilians tell us truly, *nihil praeseribitur nisi quod possidetur*. The king may prescribe the propriety of the narrow seas, because he may possess them by his navies and power. A subject cannot. But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest."

In thus limiting the king's prerogative to areas of the sea which he has possessed by his navies and power, Hale was following Selden who in his treatise *Mare Clausum*, entitled in translation *Of the Dominion, or, Ownership of the Sea* [Nedham translation, 1652, Me. et al. Ex. 204, p. 188] says:

> "It is true indeed which an eminent man saith; a *That the Sea hath been enjoyed by Occupation, not for this reason onely, becaus men had so enjoied the Land, nor is the Act or intent of the minde sufficient thereto; but that there is a necessitie of som external Act, from whence this Occupation may bee understood.* Therefore Arguments are not to bee derived altogether from a bare Occupation or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoiment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every kinde of Sea-Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure.
>
> "a Hugo Grotius, de Jure Belli ac Pacis, lib. 2.c.3.§II."

In this respect both were in accord with what appears to have been an accepted principle of international law. The English scholar Professor C. H. M. Waldock well states

that principle in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, as follows:

> "The important point which emerges from the writings of the jurists is that, despite variations in doctrine, they were at one in not recognising any possibility of a legal title to the sea-bed or subsoil under the high seas being vested in a coastal State apart from effective occupation. The same is true of the small amount of state practice which existed in regard to submarine rights. There were a number of specific claims to exclusive rights to particular resources of the sea-bed in limited areas which were based on long enjoyment or at least on actual exploitation. The best known were various pearl, oyster and sponge fisheries. But these exclusive rights to resources on the sea-bed, when recognised as valid in law, were held to belong to the claimant States by reason of their actual enjoyment (generally from time immemorial) in particular areas and under a particular claim to exclusive jurisdiction. Similarly, in a few cases mine-shafts sunk ashore appear to have been driven outwards through the subsoil to points beyond the limit of territorial waters. These shafts were commonly said to constitute an effective occupation of the particular areas mined but no more. It is true that such claims to resources of the sea-bed or subsoil were made only by coastal States but they were justified as acts of occupation, not as the natural rights of coastal States. General or natural rights to adjacent extra-territorial resources were neither recognised nor claimed."

To the same effect are Westlake, I *International Law* (1904) pp. 186-187, and Oppenheim, I *International Law* (8th ed. Lauterpacht 1955) pp. 628-631. If the law of England on this subject were less clear than it appears to

me to be, I think that the principles of international law prevailing at the time, which Waldock describes, could properly serve to clarify it. For the courts refer to and apply settled principles of international law to supplement and support the local law when the latter is uncertain or incomplete.* It would thus appear that it was solely the exercise of British naval power which supported the crown's claim in the seventeenth century to sovereignty and prerogative rights in the narrow seas and their seabed adjacent to the British coasts.† It does not appear, however, that even in the heyday of the Stuart kings' assertion of crown sovereignty over the English seas the crown ever claimed the right, commonly exercised by maritime powers claiming complete sovereignty over their adjacent seas, of excluding peaceful foreign vessels from the English seas or of levying tribute or taxes upon those permitted to pass through them. The British failure to exercise this right of a sovereign in exclusive occupation of its adjacent sea, which, as we have seen, Selden had stated to be the principal indication that the sovereign was actually in occupation of the sea, seems to me to be strong evidence that even in the Stuart days of extravagant claims the right which the crown claimed to the sovereignty of the English seas was much less than complete and exclusive dominion and ownership. Indeed when the unrestrained rhetoric of that period is discounted and

---

* *Jones v. United States*, 1890, 137 U.S. 202, 212; *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 707-711. And see *The Paquete Habana*, 1900, 175 U.S. 677, 700.

† Acceptance of the idea that the occupation of the sea by naval power could support a royal claim to ownership of the seabed was to be of short duration, however. Within a year after the end of the Stuart dynasty its demise was presaged by Sir Philip Medows, who in his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9] said: "To ride actual Master at Sea with a well Equipp'd Fleet, or to have such a Plenty of Naval Stores in constant readiness, as shall be sufficient to answer all Occasions, is not the Dominion of the Sea; This is Power, not Property, . . ."

the actual practice alone is considered, the rights sought to be exercised by the crown were almost wholly limited to the control of the fisheries, the admiralty jurisdiction and the enforcement of the right of the flag. The defendant States have cited many cases decided during that period involving the ownership of the crown of the foreshore, the beds of English rivers, relicted lands and newly arisen islands, in which the courts assumed crown ownership of the seabed from which the relicted lands or islands had arisen as a basis of decision, citing Selden and Hale. But aside from some underseas mining from the shore and some sedentary fishing for shellfish, pearls and certain minerals I have been referred to no instances in which the seabed itself in the British seas beyond low-water mark was directly involved in litigation.*

It was only during the Stuart era that crown possession of exclusive fishery rights in the sea was asserted as a basis for sustaining its claim to ownership of the sea and seabed. As we have seen, Hale made use of that argument. But the exclusive right to take swimming fish from the sea had no peculiar or necessary relationship to ownership of the seabed, contrary to the case of sedentary fisheries. Indeed while claims to wide expanses of seabed began with the Stuart kings and ended after their departure, intense interest in ocean fisheries goes back into antiquity and continues to the present day. For what is involved is a food resource of great importance to the maritime states and it is the preservation and exploitation of this resource with which they were, and still are, primarily concerned.

It will be observed that Hale in *De Jure Maris* restricted the jurisdiction and ownership of the king to the narrow sea adjoining the coast of England. The actual

* Thus it appears that even in Stuart times the situations in which claims of the crown to sovereignty of the sea were made normally involved only jurisdiction of the surface of the sea or control of the fisheries therein and not actual ownership of the seabed.

width of the narrow sea was never defined in English law. At times it was applied to the Straits of Dover or the English Channel and very commonly in the seventeenth century to the marginal sea along the whole coast or the "British Seas". Widths of 100 miles and 60 miles were sometimes suggested but never consistently followed or applied. By leaving the limits vague and ambiguous British claims to maritime sovereignty could be put forward and used as a political instrument when the navy was strong and occasion offered, and when the navy was weak the claims might fall into the background without affecting national honor.*

(d) *English law after 1688*

Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century the claim of the crown to the sovereignty of the British seas became more and more an anachronism and it was allowed to die out from practical affairs, surviving, as Fulton says, in *The Sovereignty of the Sea* (1911) pp. 21, 538, "only in the pages of historians, naval writers, and pamphleteers" and "without apparently leaving a single juridical or international right behind it." Grotius' *Mare Liberum* had finally prevailed over Selden's *Mare Clausum*. As Jessup states in *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 4: "Selden's own nation repudiated his stand during the eighteenth century. . ."†

Brownlie, in his *Principles of the Public International Law* (1966) pp. 208-209, describes the transition as follows:

> ". . .The seventeenth century marked the hey-day of the *mare clausum* with claims by England, Den-

---

* Fulton, *The Sovereignty of the Sea* (1911) pp. 15, 18-21.

† And see Pitman B. Potter, *The Freedom of the Seas in History, Law and Politics* (1924) pp. 89-91.

mark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, the sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away."

As Elihu Root, one of the most eminent of American statesmen, put it in his argument in the North Atlantic Fisheries arbitration, XI *Proceedings*, North Atlantic Fisheries Arbitration, p. 2006 [quoted in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 5]:

"These vague and unfounded claims [of the 18th, 17th, and earlier centuries] disappeared entirely, and there was nothing of them left. . . . The sea became, in general, as free internationally as it was under the Roman law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and

citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten."

Thus during the eighteenth century there developed a new principle of protection to be exercised in the marginal waters of a state to the extent that they could be controlled from the shore. This new and more realistic principle that jurisdiction could be claimed only within the belt of marginal sea which was subject to continuous domination from the land replaced the former unrealistic and extravagant idea that the exercise of naval power was sufficient to possess the sea. Within this belt of what has now come to be known as the territorial sea the coastal state was recognized as entitled to enforce its neutrality and exercise other rights. In the case of Great Britain this was a new right of modern origin derived from international law and was not a residuum of the former more extensive claim to sovereignty and ownership of the narrow or English seas. Viscount Haldane, the Lord Chancellor, speaking for the British Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*, [1914] L.R. Appeal Cases 153, said as to this [p. 174]:

"They desire, however, to point out that the three-mile limit is something very different from the 'narrow seas' limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to com-

paratively modern authorities on public international law."

The necessary conclusion is that in the eighteenth century the former claim of the crown to ownership of the seabed of the narrow or English seas went the way of the claim to the sovereignty of the sea upon which it was based. This was forcefully pointed out by Lord Chief Justice Cockburn in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, when he said [p. 196]:

> "But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining—what foreign jurist who would not deny—what foreign government which would not repel such a pretension? I listened carefully to see whether any such assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it must necessarily go with it."

Thereafter, and until the recognition in the nineteenth and early twentieth centuries of the new concept of the full sovereignty of the coastal nation in its territorial sea, claims to the seabed were made only in cases where there had been actual, and usually long-continued, possession and exploitation, such, for example, as in the case of the

sedentary pearl fisheries of the Gulf of Mannar off the coast of Ceylon and of the Persian Gulf off Bahrein.

It is true, as the defendant States point out, that during the seventeenth century and before the new concept of the territorial sea had come to be accepted, England by a number of Acts of Parliament exercised authority over and regulated in various ways fishing in the seas adjacent to the English coast as well as prevented smuggling and enforced neutrality in those waters. However, the latter two activities were carried on in the exercise of a protective jurisdiction which did not involve the, by then, abandoned claim of the crown to the absolute dominion of the sea and seabed. And the same may be said of the fisheries legislation which related to a marine resource of England with which, as we have seen, the crown had been concerned for many centuries before the Stuart kings made their extravagant claims to sovereignty of the sea and ownership of the seabed.

The new principle had its origin primarily in the necessity for maritime states to protect themselves from the operations of belligerents by defining a belt of marginal sea along their coasts in which they would enforce neutrality. Various principles of delimitation were suggested. However, the rule now generally accepted was first propounded in 1703 by a Dutch jurist, Cornelius van Bynkershoek, who in his *De Dominio Maris Dissertatio* and later works advanced the principle that the dominion of a state extended over the adjacent sea as far, and only as far, as it was able to command and control it from the land. This, he suggested, should be as far as projectiles could be fired by cannon from the shore, so that exclusive possession might be taken of the part so commanded. van Bynkershoek's phrasing of this principle in his *Quaestiones Juris Publici* (1737) "*terrae dominium finitur ubi finitur armorum vis*",* has been quoted by a legion of

* "The dominion of the land terminates where the power of arms ends."

later writers. His doctrine was attractive, conformed with the general practice that ships coming in from the sea saluted the coastal forts when within cannon range, and eventually was widely accepted not merely for purposes of neutrality but also ultimately as defining the extent of adjacent sea over which a maritime state might exert its full sovereignty as its territorial sea.

Various suggestions were made by jurists during the eighteenth century as to the distance from shore which should be regarded as the range of cannon shot for the purpose of defining the width of the territorial sea. Among these was the suggestion first advanced by Galiani in 1782,* and which at the time was fairly accurate, that three geographical miles or one marine league was the range of a cannon shot and should, therefore, be adopted as the limit of the territorial sea. It was this three-mile formulation which, largely under the leadership of the United States, was adopted early in the nineteenth century by both Great Britain† and the United States to define

* Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 6.

† The first recognition by an English court of three miles as the limit of the marginal neutrality belt was by the eminent admiralty judge, Sir William Scott, afterward Lord Stowell, speaking for the High Court of Admiralty in 1800 in *The Twee Gebroeders*, 3 C. Rob. 162, 165 Eng. Repr. 422. In *The "Anna"*, 1805, 5 C. Rob. 373, 165 Eng. Repr. 809, a case in the same court involving the legality of the seizure of an American ship by an English privateer off the delta of the Mississippi River, Sir William Scott said [pp. 385b-385c]

> "The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *'terrae dominium finitur, ubi finitur armorum vis,'* and since the introduction of fire arms, that distance has usually been recognised to be about three miles from shore."

See also Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 24.

more precisely the cannon-shot rule as to the limits of the territorial sea. Although soon outmoded as the actual range of artillery it proved serviceable and has been widely adopted by other maritime nations.

I find that some time before 1776 the earlier English pretensions to sovereignty over the English seas and with them the claim of the crown to the seabed of those seas had been abandoned and were beginning to be replaced by the new concept of a marginal band of sea within cannon shot of the shore, a distance which was later to be equated with three miles, in which the crown could enforce neutrality, control fishing and exercise other sovereign powers. I find no evidence, however, that the idea of sovereignty over the marginal belt of sea, in a territorial sense, was accepted in either English or American law until well into the nineteenth century. Indeed, in *The Queen v. Keyn*, [1876-77] L. R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved held that even as late as the date of that decision the English realm did not include the marginal sea and England did not claim territorial jurisdiction for its courts in that sea. It would appear that the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73, § 7, which claimed the open sea within one league of the coast as territorial waters, and which was passed shortly after the decision in *The Queen v. Keyn*, was intended to assert jurisdiction over the area which the court held had not theretofore been claimed, not to repudiate or overrule the decision as the defendant States suggest.* The legal posture was quite similar to that involved in the *California* decision of this Court and the subsequently enacted Submerged Lands and Outer Continental Shelf Lands Acts. I find that this Court stated

---

* In *Harris v. Owners of the Steamship Franconia*, [1876-77] L.R. 2 Com. Pl. Div. 173, three judges of the Common Pleas Division of the High Court, all of whom had dissented in *The Queen v. Keyn*, held themselves bound to apply the rule laid down by the

the facts with precise accuracy when in the *California* case, 1947, 332 U.S. 19, it said [p. 32]:

> "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders . . . But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion."

I conclude that when in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

3. The American Colonial Charters

It is the contention of the defendant States that the charters granted by the crown for the American colonies created a territorial sea 100 miles in breadth and conveyed to the companies or individual proprietors to whom the colonies were granted sovereignty and dominion over that sea, which included ownership of the seabed and its resources. The language of the charters certainly did not do so expressly. In the case of 10 of the colonies with which we are here concerned the colonial boundaries were vari-

---

majority in that case, the Chief Justice of the Division, Lord Coleridge, saying [p. 177]:

> ". . . It seems to me to be quite plain that the decision in *Reg. v. Keyn* . . . is binding upon all the Courts. The ratio decidendi of that judgment is, that, for the purpose of jurisdiction (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark."

ously described as "along the Sea Coasts", Maine, 1639 [Me. et al. Ex. 3]; "from Sea to Sea", New England, 1620 [Me. et al. Ex 11]; "along ye Sea coaste", New Hampshire, 1629 [Me. et al. Ex. 13]; "from the Atlantick and Westerne Sea and Ocean on the East Parte, to the South Sea on the West Parte", Massachusetts Bay, 1629 [Me. et al. Ex. 24]; "and bounded on the south by the ocean", Rhode Island, 1663 [Me. et al. Ex. 156]; "and bounded on the east part by the main sea", New Jersey, 1664 [Me. et al. Ex. 69]; "unto the main Ocean on the East", Maryland, 1632 [Me. et al. Ex. 141]; "all along the said Coast", Virginia, first charter, 1606 [Me. et al. Ex. 41]; "all along the Sea Coast . . . up into the Land throughout from Sea to Sea", Virginia, second charter, 1609 [Me. et al. Ex. 42]; "to the Ocean upon the east side", Carolina, 1629 [Me. et al. Ex. 271]; "all along the sea coast", Georgia, 1732 [Me. et al. Ex. 274]. In the case of New York the patent from King Charles II to the Duke of York in 1664 did not mention the ocean boundary but specifically granted Long Island and other islands and the land from the west side of the Connecticut River to the east side of the Delaware Bay [Me. et al. Ex. 67]. A boundary along the Atlantic Ocean was thus clearly implied. The grant of Delaware in 1682 was described as lying "upon Delaware River and Bay" south to Cape Henlopen, therein called Cape Lopen, which was erroneously assumed to be at the mouth of the Delaware Bay [Me. et al. Ex. 102]. Thus no grant of land fronting the sea was intended.

It appears that when the crown intended to grant territorial ownership of portions of the sea and seabed it used language which was clear and appropriate for that purpose. Thus the Newfoundland charter of 1610 specifically granted the "seas and islands lying within ten leagues of any part of the sea coast" [Me. et al. Ex. 179], and the 1621 grant of Nova Scotia conveyed islands or seas lying near or within six leagues from any part of the mainland on the west, north and east sides and to the south all the seas

and islands within 40 leagues of the shore. The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea" [Me. et al. Ex. 240, p. 101]. And when the crown in its patent for Delaware in 1682 desired to grant to the Duke of York that portion of the River Delaware and its riverbed lying within 12 miles of the town of Newcastle it conveyed in specific terms "the said River and Soyle thereof" within those limits [Me. et al. Ex. 102].

The defendant States argue, however, that the language of the charters, construed in the light of contemporary legal usage, was sufficient to accomplish these ends. The language upon which the defendant States rely and which appeared in one form of words or another in most of the charters was the grant of all jurisdiction, franchises and royalties by sea and land. I agree, however, with the United States that a grant in such general terms is not an indication that the crown claimed and intended to grant sovereignty and ownership of the adjacent seas, let alone a seabelt 100 miles wide. Jurisdiction, franchises and royalties by sea, as used in the seventeenth and early eighteenth centuries, did not necessarily involve any claim to ownership or sovereignty of the adjacent seas and appear, on the contrary, to have comprehended rights which were independent of such a claim. Certainly jurisdiction in the protective sense did not involve any such claim. I believe this is also true with respect to franchises and royalties. The term royalties, as then used, referred to the prerogative rights of the crown. These had been authoritatively described in the document entitled *De Prerogativa Regis** and included in this regard such things as wreck and royal fish. I do not understand that the sovereignty and ownership of the adjacent seas, seabed and subsoil were included, however. Indeed, as we have seen, under the older English legal tradition the concept of crown ownership of the seabed was unknown and, as I

* 17 Edw. II., Stat. 1, c. 11 [Me. et al. Ex. 729, p. 227].

have found, was first authoritatively asserted in the works of Selden and Hale in the middle years of the seventeenth century after most of the colonial charters had been granted. Moreover, it is very doubtful whether such a general grant of royalties would have been sufficient to pass a specific prerogative right not itself enumerated or in some way identified. Thus it was held in an opinion by the Attorney General and Solicitor General of England to the Commissioners of Trade and Plantations in 1723, Chalmers, *Opinions of Eminent Lawyers* (1st Am. ed. 1858) pp. 141-142, that the charters of New Jersey did not grant royal mines even though the granting clauses included the general terms "mines", "minerals" and "royalties". And to the same effect with respect to a royal grant of franchises, without more, is the opinion of the court in *Attorney-General v. Trustees of the British Museum*, [1903] L.R. 2 Ch. Div. 598, 614.

I think that to hold that by the use of the word "royalties" in these colonial charters the crown conveyed full sovereignty and dominion over the adjacent seas and ownership of the seabed and its resources is to load that single word with far more cargo than it can be asked to carry. Moreover, if the charters did actually grant ownership of the adjacent sea it would not have been necessary for them expressly to convey harbors, havens, ports, bays, inlets and creeks of the sea, as well as fisheries, as was done in one form of words or another in most of them.

The defendant States point to the fact that in some cases the charters also granted islands off the coast of the colony. They contend that a grant of islands off the coast was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. I cannot agree. On the contrary, Bartolus, upon whom they rely as having enunciated in the fourteenth century the doctrine that a coastal state was entitled to islands within 100 miles of the coast, stated that while the

coastal state might exercise exclusive protective jurisdiction over the intervening seas, it had no right of sovereignty over those seas, its property right involving only the islands, not the seas.* I find nothing in the English writers of the seventeenth and earlier centuries to the contrary. Moreover, this contention loses its force when we consider that the defendant States themselves have not urged in this case that the third Virginia charter, granted in 1612, which conveyed islands within 300 leagues of the Virginia coast, thereby conferred upon the colony ownership of the sea and seabed seaward to that distance. [Me. et al. Ex. 43]. In the second *Louisiana* case, 1960, 363 U.S. 1, 67-70, 81, this Court held that the statehood-enabling acts for Louisiana and Mississippi which included within those prospective States all islands within three and six leagues, respectively, of their shores, did not embrace within their territory all the waters within that distance as well. This case would appear to be controlling on this point.

The defendant States further contend that the colonial charters should in any event be construed as creating territorial seas and granting sovereignty, dominion and seabed ownership of those seas. They urge this conclusion in the light of the contemporaneous claims of the British crown in the English seas and of the fact that the persons who were involved in asserting and defending those claims were largely the same persons as those responsible for chartering and establishing the American colonies. I cannot agree with this conclusion. The claim of the crown in the seventeenth century to sovereignty of the English seas was, as we have seen, quite different from the modern concept of sovereignty of the three-mile belt of territorial sea and was in *no* sense the precursor of the latter. It involved, at bottom, protection and security, matters of

---

* Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926) pp. 101-102.

vital importance to the insular English nation faced, as it was, on at least two sides by nearby nations which were frequently hostile. The English seas had no defined or established limits and were expanded and contracted as the needs of the times changed and as English naval power, which enforced the crown's claimed sovereignty, was greater or less.

The situation off the coasts of the defendant States in colonial times was quite different. Aside from the fisheries off the coasts of Newfoundland and Nova Scotia, which were very rich and had long been exploited by the French, the Spanish and the Portuguese, as well as by the English, England showed little interest in the North American coastal seas. Compared to those fisheries the fisheries in in the areas southwest of Nova Scotia and Newfoundland were relatively unimportant and in the more southern areas insignificant. Hale pointed out in *De Jure Maris* that occupation by the king's navies and power was necessary for the acquisition of sovereignty and dominion over the adjacent seas and this was the then prevailing idea. The narrow seas adjacent to the coasts of the British Isles had been thus occupied by British naval power for centuries. But very little English naval occupation of the seas adjacent to the Atlantic coast of the English colonies in America had taken place except with respect to the rich fishing areas off the coasts of Newfoundland and Nova Scotia. And it does not appear that there had been any significant occupation of the seabed. The symbolic occupation of the adjacent land areas by English explorers was not enough for that purpose under English law, as Selden pointed out in the portion of his treatise *Mare Clausum* (Nedham's translation), which has already been quoted.

While the colonial charters may well have conferred a protective admiralty jurisdiction over the sea adjacent to the colonies, I am satisfied that they did not convey territorial property rights in that sea or its seabed resources. I am supported in this conclusion by decisions of

the highest courts of two members of the British Commonwealth, Canada and Australia. *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, involved rights to the natural resources of the seabed adjacent to the British Columbia coast which were claimed by the province on the basis of its colonial grants and charters. The Supreme Court of Canada held in that case [p. 373] that the territory granted to the province ended at low-water mark and that it had not acquired and did not have ownership or property in the territorial sea but that these were vested in the Dominion government. In *Bonser v. La Macchia*, 1969, 43 Aust. L.J. Rep. 411, the High Court of Australia had to deal with the question whether the territorial limits of the State of New South Wales extended into the waters adjacent to its coast. The court decided that the territory of the colonies, including New South Wales, ended at the low-water line. Chief Justice Barwick, who was with the majority, in his opinion said [p. 414]:

> "I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters."

I am also supported in my conclusion by the decision of the English Court for Crown Cases Reserved in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, in which the court held that the English courts of admiralty did not have the territorial jurisdiction over crimes committed by foreigners on the high seas, even on the marginal sea adjacent to the English coasts, which the common law

courts exercised within the realm. The realm, as Lord Chief Justice Cockburn pointed out in his prevailing opinion, included only the area within the bodies of the counties and ended at low-water mark on the coast.

The defendant States point out that these cases were decided long after 1776 and are, therefore, they say, irrelevant to our problem. I cannot agree. To the extent that they discuss the state of English law prior to American independence with respect to the claims of the crown to sovereignty over the marginal sea they are highly relevant. For the opinions were delivered by eminent English and Commonwealth judges upon a matter of English law. I have, therefore, given these opinions the authority and respect to which I believe them to be entitled.

The defendant States offered in evidence a number of maps made during the colonial period in which the sea off the Atlantic coast of the American colonies was designated as the British sea or the sea of the British Empire, or portions of it as the sea of Carolina, Virginia, Maryland, New York, New England or Nova Scotia. They urge that these maps are evidence of the recognition of a territorial sea off the Atlantic coast in the colonial period. I cannot agree. The evidence indicates, as I have found, that the concept of a territorial sea did not arise until after the colonial period. Certainly the concept of a sea of the British Empire extending across the ocean from the British Isles to the coasts of the American colonies, which was one of the most extravagant of the Stuart claims, did not involve a claim to territorial dominion. Nor did the designation of portions of the Atlantic Ocean by the names of the colonies the shores of which they washed involve such a claim, any more than did the names given on some of the same maps to the Gulf or Sea of Mexico, the Sea of New Spain, and the Sea of California. Being used by English cartographers these seem obviously to have been employed solely as convenient geographical names with no overtones of territorial sovereignty on the part of the Spanish colonies for

which they were named and so, I believe, were the names used on the maps to which the defendant States refer.*

If it be assumed *arguendo* that the English crown in the seventeenth century claimed sovereignty over the seas adjacent to the American colonies including the ownership of the seabed, and if it be further assumed that this sovereignty and ownership somehow passed to the colonies, the ultimate conclusion must be the same. For so long as the colonies bore allegiance to the crown of England they were subject to the English law as it developed with respect to these matters of sovereignty and ownership. And since, as I have found, the pretensions of the crown to sovereignty of the adjacent seas had been abandoned as a principle of English law before 1776, the colonies would have ceased before independence to have the rights in the adjacent sea which the crown no longer claimed.

The United States contends that assuming *arguendo* that property rights to the marginal seas and seabed were conveyed to the colonies by the original grants and charters, those rights, at least in most of the colonies, reverted to the crown when they became crown colonies before independence. However, I do not find it necessary to discuss this contention since, as will be developed later in this report, those rights, if any, would have passed in any event to the federal government either from the crown under the Peace Treaty of 1783 or from the individual states under the Constitution of 1787.

---

* In his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9], Sir Philip Medows said:

> "Much less do such usual Expressions and Words as these, the *British* Seas, the Sea of *England*, *Our Seas*, import any legal Dominion, but only denote a Geographical Description, as *Mare Flandricum*, *Mare Normannicum*, *Mare Aremoricum*, *Mare Aquitanicum*, and a hundred others do. And nothing more usual, than for Seas to receive their Denominations from the Shoars they rowle upon, and *Our Seas* are the Seas which rowle upon our Shoars."

I need only add that in my view the evidence in the present case fully supports the finding of this Court in the *California* case, 1947, 332 U.S. 19, 32-33, that the English charters which were granted to this nation's settlers did not show a purpose to set apart an ocean belt for colonial or state ownership.

Before leaving the subject of the rights alleged to have been received by the colonies from the crown I note that the State of New York in its answer claimed that in its inception as a Dutch colony it received seabed rights from the crown of Holland. However, no evidence of the grant of any such rights was offered and there is nothing in the record to support the allegation of the State of New York in this regard.

4. The Activities of the Colonies in their Adjacent Seas during the Colonial Period.

The principal activity of the colonies in their adjacent seas related to the fisheries. While the great bulk of this activity centered in the areas of the rich fisheries off the coasts of Newfoundland and Nova Scotia, in which the New England colonists actively participated, there was a modest amount of fishing in the seas off the New England colonies themselves and fishing there and in the richer fisheries to the northeast was an important activity in those colonies. In the case of the colonies farther to the south it was minimal. There is evidence that the New England colonies at times sought to establish exclusive rights to the fisheries in both their inland waters and the waters of the sea off their respective coasts. It would appear, however, from orders of the English privy council issued in 1619 and 1620 that no exclusive grant to the colonies of jurisdiction over the fisheries had been intended by the crown. For by those orders the southern and northern colonies were empowered to fish within each other's limits for the sustentation of their people and also to have

freedom of their shores for drying nets and taking and saving fish. *Acts of the Privy Council (Colonial)* [1621] pp. 40-41 [Me. et al. Ex. 237]. Thus it appears that the ultimate control of the fisheries was retained by the crown and not granted to the colonies. Moreover, the sections of the sea involved, ownership of which might be claimed on the basis of occupation, were the areas immediately adjacent to the shore which were undoubtedly within the three-mile belt that is not in controversy in this case. The New England fishing in inland and nearby waters, as distinguished from the fishing in the rich fisheries in the high seas to the northeast, necessarily involved the use of local shore-based facilities to which to bring and cure the fish. It was for the regulation of fishing which involved these shore-based activities that much of the colonial legislation in evidence was directed. I am satisfied that the colonial legislation relating to fisheries was based on the control which the colonies exercised over their own residents or on their control of activities on or close to their shores or in inland waters. Similarly, legislation prohibiting the pollution of coastal waters and regulating local shipping was directed to the health and welfare of the colonial residents and was not based on any claim to ownership of the sea or seabed.

The defendant States also point to the whaling activities of the colonists. In the early colonial period these were confined to "drift whales", dead whales cast or driven on shore or found within a short distance from the shore and brought ashore. That part of this activity which involved the sea was well within the three-mile belt. It was only in the later colonial period that colonists began to take whales at sea. In this later activity they ranged widely over the oceans far from any area which could conceivably be regarded as under colonial jurisdiction. Likewise the colonial legislation regulating whaling appears to have dealt with the conduct by the colonists of this activity wherever it was carried on, not merely in the adjacent

seas. Whales, as has been noted, were considered royal fish. Their taking was regarded as a royal prerogative and was the subject of the colonial legislation to which I have referred. But since the legislation regulated such taking by local residents of whales wherever they were to be found, the prerogative right under which it was enacted could not have been possessed upon any theory of ownership of the coastal seas.

The only activity of the colonists directly related to the seabed was the sedentary fishery involved in the gathering of shell fish. While this took place largely in shallow protected bays and other inland waters, it is doubtless true that some of it took place in the shallow and tidal waters along the seashore. Such activity might possibly support a claim to the areas in question based on actual occupation of them. But in any event such minimal activity in the seabed was clearly within the three-mile sea belt which is not here in litigation and involved no claim whatever to the deeper waters farther offshore on the continental shelf, with which we are concerned. It certainly did not constitute basis for a claim to the ownership of the ocean and its bed for a distance of 100 miles offshore. Nor does the evidence as to derelict or reclaimed lands support such a claim. These, of course, became a part of the territory of the colony when they emerged from the sea, but there is no evidence whatever of any claim by a colony to the seabed from which they arose. Nor is there evidence that a grant of any portion of the bed of the high seas, as distinguished from land under rivers, bays and similar inland waters, was ever made by any colony. Wreck, treasure trove, flotsam, jetsam and lagan are, of course, not natural resources of the sea or seabed. The scanty evidence of colonial activity with respect to these droits of admiralty does not indicate that claims to these chattels were based on sovereignty and ownership of the seas but rather upon their being found upon or brought to land in the colony.

The defendant States urge that the exercise by the

colonies of admiralty jurisdiction was territorial in nature and was based upon the colonial sovereignty and ownership of the adjacent seas. I am not able to find that this was so. As indicated earlier in this report, the English admiralty jurisdiction was based on a protective concept, not on a territorial one. It was exercised with respect to piracy and with respect to English vessels and subjects anywhere on the high seas. Indeed, as was held in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the court did not have territorial jurisdiction even in what is now the narrow three-mile belt of territorial sea. The admiralty jurisdiction granted to the colonies was certainly no more territorial than that of England and was not related to any claim of sovereignty or ownership of the adjacent seas. This is highlighted by the fact that the Maine charter of 1639 [Me. et al. Ex. 3] granted admiralty jurisdiction out to 20 leagues although it only included within the territory of the province islands within five leagues of the mainland. Even the earliest exercises of admiralty jurisdiction by the colonies were subject to the ultimate control of crown officials and review by the High Court of Admiralty in England. And after 1696 vice-admiralty courts established by the crown in each colony assumed complete admiralty jurisdiction. This jurisdiction was that of the crown, not the colonies, since these were crown courts over which the colonies had no control and they enforced English navigation laws and entertained maritime controversies as well as cases of piracy, privateering and felonies committed by English subjects on the high seas. In the eighteenth century these royal courts came to enforce the White Pine Act, the Stamp Act, the Tea Act and other English statutes. The expanded jurisdiction of the vice-admiralty courts and the fact that they sat without juries and were not responsible to the colonies were among the grievances leading to the American revolution.

My conclusion is that colonial activities do not support the claim that dominion and control of the seabed and

subsoil of the adjacent sea beyond the three-mile limit seaward for 100 miles or any lesser distance were claimed or exercised by the colonies.

5. The Effect of Independence and the Ratification of the Constitution

The defendant States urge that upon attaining independence in 1776 they individually succeeded to the maritime territorial sovereignty and dominion over the adjacent seas and seabed both of their predecessor colonies and the British crown. As hereinabove indicated, I am unable to find that the colonies had previously acquired territorial sovereignty and dominion over their adjacent seas and seabed. But if *arguendo* we assume that sovereignty and dominion over the seas and seabed off the American coast were still claimed by the crown in later colonial days, they were, I believe, retained by the crown as prerogatives of its sovereignty over the British colonies. The question remains, however, whether such crown sovereignty and dominion, if any, as then existed over the marginal sea and seabed off the Atlantic coast passed at independence and upon the conclusion of peace with Great Britain to the individual states or to the United States as a national sovereign.

I find that upon the establishment of the First Continental Congress in 1774 the United States of America emerged, first as a federation of colonies and after independence in 1776 as a federation of internally independent but united states, to which newly-formed federation the people of the several states delegated those sovereign powers associated with external sovereignty. This Court has heretofore taken such a view, holding that upon achieving independence the powers of external sovereignty which the British crown had theretofore exercised over the American colonies passed to the national government then represented by the Continental Congress and not to the several states. *United States v. Curtiss-Wright Corp.*,

1936, 299 U.S. 304. And see *Respublica v. Sweers*, Sup. Ct. Pa. 1779, 1 Dall. 41, 44; *Chisholm v. Georgia*, 1793, 2 Dall. 419, 470-471; *Penhallow v. Doane*, 1795, 3 Dall. 54, 80-81, 91. In the *Curtiss-Wright* case this Court said [pp. 316-317]:

> "During the colonial period, those [international] powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United [not the several] Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'
>
> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency —namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Penhallow v. Doane*, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his

> Britannic Majesty and the 'United States of America.' 8 Stat.—European Treaties—80."

The defendant States assert that the *Curtiss-Wright* case was wrongly decided upon a misconception of the historical facts and they make an elaborate argument in support of the thesis that no national government with even limited powers of external sovereignty came into existence until the Constitution was adopted, the several states being meanwhile completely independent and sovereign in the international and every other sense. There is unquestionably a great diversity of opinion on this question among historians and statesmen of the period and the evidence in the present case is sharply conflicting. But there is ample evidence to support the finding, which I make, that the Continental Congress and its successor in 1781, the Congress of the Confederation, carried on the war for independence, raising and supplying the continental army and navy, that each of them, in turn, established diplomatic relations and made treaties with foreign nations, including the treaty of peace with Great Britain, that they exercised appellate jurisdiction in admiralty, and that they exercised other sovereign powers, such as regulating the coinage and providing a general postal service. In my view, the historical facts as to the pre-Confederation period are fairly summarized by Evarts Boutell Greene in *The Foundations of American Nationality* (1922) as follows [pp. 558-559]:

> "Without a formal constitution, Congress managed to organize extensive departments for war, foreign affairs, and finance, as well as a general postal service. It even organized a court for the trial of appeals in prize cases. From this practical point of view, it can hardly be denied that the Continental Congress, with all its obvious limitations, was a *de facto* federal government, acting for a real political entity known to the outside world as the United States of America."

The Articles of Confederation which came into force in 1781 expressly delegated these and other powers to the Congress of the Confederation, and the Constitution adopted in 1787 continued them in the national government in the "more perfect union" which it was its purpose to accomplish. I conclude that there is ample support for the accuracy of the historical facts upon which this Court based its decision in the *Curtiss-Wright* case.

Among the powers acquired by the national government at independence and through the Treaty of Peace were such sovereignty and dominion, if any, over the American coastal seas and seabed as had theretofore been vested in the British sovereign. This Court decided in *Martin v. Waddell*, 1842, 16 Pet. 367, and reaffirmed in *Massachusetts v. New York*, 1926, 271 U.S. 65, that rights to the soil under navigable waters inhere in the sovereign and pass to a new sovereign upon a transfer of sovereignty. While *Martin v. Waddell* involved inland waters in New Jersey and *Massachusetts v. New York* involved waters in Lake Ontario within the boundaries of New York, the principle which they annunciate is equally applicable to the soil under the territorial sea. *United States v. Texas*, 1950, 339 U.S. 707, 717. It necessarily follows that if the British crown, prior to independence, did claim sovereignty and dominion over the sea and seabed off the Atlantic coast beyond the territorial limits of the states that sovereignty and dominion passed after independence to the national government in which the powers of external sovereignty were reposed and not to the defendant States. This result, moreover, is consonant with the doctrine of *United States v. California*, 1947, 332 U.S. 19, and the cases which followed it, that the possession of rights in the adjacent seas and seabed is an incident of that international or external sovereignty which, as I have found, was reposed in the national government from the time of independence.

Following the end of the war for independence the Congress of the Confederation negotiated the Peace Treaty of 1783 with the British government through commissioners which the Congress appointed and instructed. In these negotiations, in addition to the lands west of the Appalachian Mountains, the commissioners were particularly concerned with preserving the common right of Americans to the rich fisheries of the seas off Newfoundland and Nova Scotia. The Treaty secured these fishing rights to all Americans, not merely to the citizens of particular states. The Treaty also granted the United States all islands within 20 leagues of its shores. Since that distance is greater than that specified with respect to coastal islands in the charter grants of most of the colonies, but less than that mentioned in the Virginia charter, it is clear that the commissioners were seeking a uniform island claim for the United States rather than pressing the separate island claims of the individual states. The defendant States assert that this grant of islands included a grant of the intervening sea and seabed which extended the territorial limits of the coastal states out 20 leagues into the sea, but, as this Court said in *United States v. Louisiana*, 1960, 363 U.S. 1, 68, "it is hardly conceivable that this provision of the Treaty was intended to establish United States territorial jurisdiction over all waters lying within 20 leagues (60 miles) of the shore."

The United States contends that if the defendant States did obtain rights to the sea and seabed adjacent to their coasts either through their early charters and grants or from the crown in 1776 when they became independent, neither of which I have found to be the fact, they lost these rights to the United States through their ratification of the Constitution of 1787 and the exercise by the United States of its constitutional authority over foreign affairs. Certain it is that any doubt as to whether after independence the United States under the Continental Congress and under the Congress of the Confederation possessed the

attributes of external sovereignty, including the power to conduct foreign affairs, was resolved and those attributes were confirmed in the federal government by the Constitution of 1787. If we assume, *arguendo*, that the defendant States did acquire seabed rights, as they claim they did, and retained them during the Confederation period, I think that it would have to be concluded that these rights were lost to the United States upon their ratification of the Constitution and that the contention of the United States in this regard would have to be upheld. For, as we have seen, this Court has ruled that such rights belong to the holder of external sovereignty, *United States v. California*, 1947, 332 U.S. 19, 38-39; *United States v. Texas*, 1950, 339 U.S. 707, 718, and pass with the transfer of sovereignty from one holder to another, *Massachusetts v. New York*, 1926, 271 U.S. 65, 89. Moreover, in the *Texas* case this Court held that this is exactly what happened to Texas' claims to seabed rights when it was admitted into the union.

6. THE POST-1787 PERIOD

(a) Recognition of the territorial sea

As I have heretofore indicated, I do not find that either the colonies or the crown made any claim to sovereignty over or ownership of the sea or seabed off the coast of the colonies in the period immediately prior to independence. Accordingly, no such right passed either to the states or to the federal government at independence or under the Treaty of Peace. But as we have seen the concept of a narrow belt of marginal sea within cannon shot of the shore, later equated with three miles, over which the littoral state could exercise jurisdiction to enforce its neutrality and for other purposes had already then begun to be recognized. The United States very early in its national existence took a leading part in advocating and developing this concept as a three-mile belt of territorial sea within which the adjacent state could enforce neutrality and, as

the doctrine developed later on, exercise virtually unlimited jurisdiction and sovereignty, subject to the right of innocent passage by peaceful foreign vessels, and beyond which the high seas were international waters open to all.

It is true that both Great Britain and the United States have asserted by statute the right to exercise jurisdiction over foreign vessels beyond the three-mile limit, usually out to a distance of 12 miles, to prevent smuggling in violation of their customs laws and to enforce sanitary measures. But these statutes which authorized the exercise of jurisdiction for a special protective purpose only, did not extend the territorial sovereignty of the maritime state to that distance.* It is also true that not all maritime states have limited their own territorial sea to a belt of three miles. Great Britain, the United States and most other maritime nations have adhered to the three-mile limit, however. And it is the fact that during the nineteenth and twentieth centuries the comparatively narrow belt of marginal sea which I have been discussing came to be generally recognized by the nations and in international law as a territorial sea belonging to the adjacent state and in which it could exercise as full sovereignty and dominion as in its upland territory, subject to the right of free passage by peaceful foreign vessels, but beyond which the high seas were common and free to all.† And since under our federal system the United States is the holder of external sovereignty, it was the federal government rather than the states which acquired paramount rights in the newly-recognized territorial sea and full dominion over the

---

* The difference between the exercise on the seas of absolute jurisdiction within its territory and of the power to protect itself from injury beyond its territorial limits was early recognized. Marshall, C. J., in *Church v. Hubbart*, 1804, 2 Cranch 187, 234.

† *Convention on the Territorial Sea and the Contiguous Zone Part I*, in force September 10, 1964, 15 U.S.T. Pt. 2 pp. 1606. 1608 et seq.

resources of the seabed under it. *United States v. California*, 1947, 332 U.S. 19, 38-39.

There is in this record evidence of a number of instances in which one or another of the defendant States have asserted rights to the seabed of the marginal sea within the three-mile territorial limit, most of them adjacent to the shore. The defendant States point out that upon various occasions prior to 1947 one or another of them had executed deeds of portions of the seabed of the marginal sea to the United States at the request of officers of the federal government. But, as this Court held in *United States v. California*, 1947, 332 U.S. 19, 39-40, in the absence of a congressional surrender of title such action by its agents could not preclude the United States from asserting its legal rights. Moreover, as the Court pointed out in that case, it was not until the California oil issue began to be pressed in the 1930s that either the states or the federal government had any reason to focus on the question which of them had paramount rights in the three-mile belt. In any event the right to exploit this area, having been confirmed to the defendant States by the Submerged Lands Act, is not involved in the present case. Moreover, the exercise by those states of rights in the three-mile marginal belt defined by the United States and generally recognized as the territorial sea certainly does not imply a claim to an indefinite area seaward of the territorial sea. And I have been referred to no instance in which a defendant State, prior to the discovery of oil and gas under the bed of the continental shelf, made any claims to, let alone occupied, the seabed beyond the three-mile limit. Indeed, it is an admitted fact that from the foundation of the union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States which might have been the basis for such a claim.

It is clear that the extent and limits of the territorial sea were indefinite in the beginning, just as had been the limits of the earlier concept of the narrow seas. Since the territorial sea is physically a part of the high seas, an area in which all maritime nations have always been particularly interested, the maintenance of sovereignty over it has always involved the foreign relations and defense activities of the maritime state in a very special sense. Its extent and limits have been dependent upon the successful conduct by that state of its foreign relations and defense. Accordingly, even if we assume *arguendo* that the defendant States did acquire in some manner and continued to have jurisdiction and sovereignty over the marginal seas, the geographical extent and limits of that jurisdiction were necessarily subject to the actions of the federal government in defining the extent of the American territorial sea in the course of exercising the foreign relations and defense powers which the states had entrusted to it. As we have seen, the federal government did define those limits as three miles seaward of the coast and secured very general international acceptance of that definition. I am satisfied that by this action the federal government effectively limited to the three-mile belt any possible claim of the defendant States to the resources of the seabed adjacent to their coasts. The defendant States argue, however, that in so doing the federal government took part of their territory, which it had no constitutional power to do. But defining in the exercise of its constitutional powers an indefinite and previously undefined limit of the claim of a state of the union in the sea is a very different thing from detaching from that state a tract of upland which is clearly within its previously recognized and established boundaries.

(b) The new continental shelf doctrine

President Truman's Proclamation of September 28, 1945, 59 Stat. 884, first claimed for the United States jurisdiction and control over the natural resources of the

subsoil and seabed of the continental shelf contiguous to the coasts of the United States. It opened a new chapter in the international law applicable to this area. For it, and the Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. Pt. 1, p. 471, which followed it, assured to each coastal nation the exclusive right to explore and exploit the resources of the seabed and subsoil of the adjacent continental shelf beyond the territorial sea regardless of whether or not the nation had actually occupied or exploited the seabed and subsoil, the resources of which it claimed. Within the limits of the territorial sea that right had come to be generally recognized. But prior to the Truman Proclamation, it was the accepted doctrine of international law, as we have seen, that to be recognized as valid, claims to exclusive rights to the resources of the seabed at least beyond the territorial sea must be based on long enjoyment (prescription) or on actual exploitation (occupation). The state of international law on this subject prior to 1945 is fairly and accurately summed up by Professor Waldock in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, from which I have already quoted.

The arbitral decision in the *Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi*, 1 International and Comparative Law Quarterly (1952) 247, appears to be the only judicial precedent relating to the right of a coastal state to seabed resources outside its territorial limits which had been decided before the Convention on the Continental Shelf came into effect. The case involved a claim by Petroleum Development (Trucial Coast) Ltd. to petroleum resources of the seabed beyond the territorial waters of Abu Dhabi under a concession granted in 1939 by the ruler of that sheikhdom. In that case it was argued that the Truman Proclamation and the similar proclamations by a number of other nations were the expressions of principles which were already a part of international law and should, there-

fore, be applied to uphold the exclusive rights of the Sheikh to the seabed of the continental shelf adjacent to the territorial waters of his sheikhdom. It was also argued that the established rule of international law was set out in draft articles on the subject which had been prepared by the International Law Association and the International Law Commission for the consideration of the then impending United Nations Conference on the Law of the Sea. The umpire, Lord Asquith of Bishopstone, rejected these contentions, holding that the proclamations and draft articles thus relied on were merely tentative and exploratory and that the proposition that the coastal state has exclusive rights in the bed of the continental shelf had not yet assumed the definitive status of an established rule of international law. Lord Asquith accordingly held that under the then existing rule of international law the Sheikh of Abu Dhabi did not have exclusive rights in 1939 to the resources of the subsoil of the Continental Shelf beyond his territorial sea which could have passed in that year under his concession to Petroleum Development (Trucial Coast) Ltd. The defendant States argue that since this proceeding was merely an arbitration and not a judicial proceeding it is not evidence of the pre-1945 international law on the subject. I cannot agree. On the contrary, I am satisfied that international arbitrations such as this are properly held to be evidence of the existence of the rules of international law which they apply. As such they have been relied on frequently by the courts. Thus the Abu Dhabi arbitration itself was cited by the Supreme Court of Canada in *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, 376, for the proposition that in 1939 the rule that coastal states had exclusive rights to the bed of the continental shelf did not exist as a legal doctrine, the very proposition with which we are here concerned.

The defendant States urge that even if they had no rights in the seabed of the continental shelf prior to 1945 and the exclusive rights thereto claimed by the Truman Proclamation sprang into existence for the first time upon its promulgation, as I find that these rights did, they should nonetheless prevail, under our constitutional system, in view of their sovereignty over the adjacent coast. In the light of the Ninth and Tenth Amendments and more basically in view of the nature of our federal system, they argue, the federal government has only such powers, sovereignty and territory as have been granted to it by the states, all residual powers, sovereignty and territory being retained by the states. This proposition must, of course, be conceded. The real question, however, is whether the powers, sovereignty and territory granted to the federal government included these newly claimed rights in the seabed of the continental shelf. But this Court in *United States v. California*, 1947, 332 U.S. 19, 34-35, has held that the rights to the seabed of the territorial sea belong to the federal government under the Constitution rather than to the states, and in *United States v. Louisiana*, 1950, 339 U.S. 699, 705, that *a fortiori* the ocean beyond the three-mile belt of territorial sea is in the domain of the nation rather than that of the separate states. The defendant States concede that in order to sustain their position in this regard this Court must overrule those cases, which they urge were wrongly decided. However, if this is to be done it must be done by the Court itself, not by its special master. Unless and until these cases are overruled I regard myself as bound by the rule of law which they enunciate. I, therefore, cannot accept this contention of the defendant States.

(c) Validity of the Submerged Lands Act

The defendant States further argue that they are, at the very least, constitutionally entitled to seabed rights within their recognized historic boundaries out to three

leagues from the shore. They base this argument upon the fact that under the Submerged Lands Act such rights, upon proof of historic boundaries, were granted to the states bordering the Gulf of Mexico and that to deny the Atlantic states a similar right to the resources of the continental shelf within historic boundaries out to three leagues is to discriminate against them without a rational basis and thus to deny them their constitutional right to an equal status in the union with the Gulf states. With respect to this contention, it is sufficient to point out that the "equal footing" doctrine applies only to political rights, not to property rights. The seabed rights which the defendant States claim are clearly property rights which are subject to such disposition as the Congress of the United States in the exercise of its unreviewable discretion sees fit to make of them. It was expressly so held by this Court in *Alabama v. Texas*, 1954, 347 U.S. 272. That case is conclusive on this point, unless overruled, as the defendant States urge that it should be. But here again this is for the Court itself, and not for its special master, to decide. Moreover, in any event the defendant States have made no showing that they ever expressly claimed seaward boundaries of three leagues or more. The most that can be said in this regard is that some of them at various times since 1789 have enacted statutes establishing a three-mile boundary in the marginal sea* the same boundary which the Submerged Lands Act confirmed to all of them in 1953.

---

* *Massachusetts* 1859 (Stat. 1859, ch. 289, as amended, Mass. Gen. Laws Ann. ch. 1, § 3); *Rhode Island* 1872 (R.I. Gen. Stat. 1872, Tit. I, ch. 1, § 1); *New Hampshire* 1901 (N. H. Laws 1901, c. 115); *New Jersey* 1906 (N. J. Stat. Ann. Tit. 40, § 18-5); *Georgia* 1916 (Acts 1916, p. 29, Ga. Code Ann. § 15-101). See *United States v. Louisiana*, 1960, 363 U.S. 1, 21 fn. 22. See also North Carolina 1947 Sess. L., c. 1031, N. C. Gen. Stat. § 141-6.

7. The Individual Defenses of Rhode Island and North Carolina

These two defendant States urge, as do the others, that they became wholly independent states in 1776 and, as such, entitled to the seabed rights they claim. With this contention I have already dealt. In the cases of Rhode Island and North Carolina, however, there is an additional factor. Neither of these two States had ratified the Constitution by March 4, 1789 when the government which it established became operative. In fact North Carolina did not ratify the Constitution until November 21, 1789 and Rhode Island not until May 29, 1790. The point urged is that, in any event, during those intervening periods of time each of these States was wholly independent, both internally and externally, since the confederation of which they had been members had ceased to exist and they had not yet joined the new union. I do not think that this contention is valid. There is no evidence that either Rhode Island or North Carolina had withdrawn from the union of states formed by the Articles of Confederation of which it was a member, or that the union had been dissolved by the Constitution which was designed not to dissolve but to perfect it. The Congress during this period recognized North Carolina and Rhode Island as a part of the United States and in its legislation distinguished them from foreign states, kingdoms and countries. Act of July 31, 1789, 1 Stat. 48 §§ 38, 39; Act of September 16, 1789, 1 Stat. 69, §§ 2, 3. There is no evidence that Rhode Island or North Carolina were recognized as externally sovereign States by foreign nations then or at any later time. Moreover, even if Rhode Island and North Carolina, like Texas, had possessed external sovereignty which included seabed rights, those rights would have passed to the United States when those States ratified the Constitution, just as happended in the case of unquestionably independent Texas. *United States v. Texas*, 1950, 339 U.S. 707.

8. The Individual Defense of Georgia

Georgia asserts as an individual defense that it is entitled to the resources of the seabed beyond three miles under its boundary settlement agreement of 1802 with the United States by which it ceded its western lands to the United States and the United States in turn ceded to Georgia its title to any lands within the United States lying east of those western lands and south of the southern borders of Tennessee, North Carolina and South Carolina. I have fully discussed this defense earlier in this report in connection with my consideration of the pending motion of the United States for judgment and need not repeat that discussion here. Suffice it to say at this point that I find no merit in this contention.

9. Request for Accounting

In the complaint the United States alleges that the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in submerged lands in the Atlantic Ocean in the area in controversy and it asks for an accounting for all money derived therefrom. In its answer the State of Maine admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain submerged lands in the Atlantic Ocean some portion of which may lie more than three miles seaward from the coast line. It does not appear, however, that the corporation to which the State of Maine granted this license has actually engaged in any exploration or exploitation under it or made any payments under it to the State. Nor has the United States at the hearing or in its briefs pressed its request for an accounting. It would, therefore, appear that no accounting need be ordered at this time.

D. CONCLUSIONS

Throughout the preceding discussion I have stated my findings with respect to what appear to be the pertinent facts involved in the proceeding. I shall, therefore, not restate these findings at this point, but merely state the conclusions to which I have been led by my consideration of the facts and the relevant principles of law involved.

1. English law prior to the accession of the Stuart dynasty in 1603 did not recognize ownership by the crown of the seabed and subsoil of the narrow or English seas.

2. The sovereignty claimed by the crown prior to 1603 in the English seas was protective and not territorial in nature.

3. In the seventeenth century under the Stuart dynasty the crown not only claimed sovereign jurisdiction but also a right of property in the English seas and their seabed and these claims were recognized at that time in English law.

4. Claims of the crown to exclusive fishery rights in the English seas did not, except during the Stuart era, involve claims to the ownership of the seabed of those seas.

5. The jurisdiction in admiralty claimed and exercised by the English crown on the high seas in the centuries prior to 1776 and the right of the flag enforced by it were of a protective nature and were not exercised territorially in the so-called English or narrow seas.

6. The rights of the crown to emerged or relicted lands and to royal fish, wreck, treasure trove, flotsam, jetsam and lagan were based, during the centuries preceding 1776, on its claim, under its prerogative, to ownerless property, although, during the Stuart period, some of these rights were also based on the claim of the crown to ownership of the seabed.

7. Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century, the right of the crown to the sovereignty of the English seas became more and more an anachronism and it was allowed to die out from practical affairs, so that before 1776 it had become obsolete and had been abandoned as a principle of English law. With it disappeared the earlier claim of the crown to ownership of the seabed of the English seas.

8. In the eighteenth century there arose a wholly new concept of a comparatively narrow belt of marginal sea lying within the range of cannon shot from the shore in which a coastal state might exercise sovereignty to enforce its neutrality and for other purposes. By 1776 this concept was beginning to be recognized in English law.

9. Early in the nineteenth century the width of this marginal or territorial sea, as it came to be called, was defined by the United States, Great Britain and many other maritime nations as three geographical miles and within it the sovereignty of the coastal nation is now recognized as supreme, subject to the right of innocent passage by peaceful foreign vessels.

10. Except for the extravagant claims of the Stuart kings to ownership of the entire seabed of the English seas, claims which died with the end of their dynasty, the law of England prior to 1783, in conformity with international law, recognized claims to the ownership of the seabed only on the basis of prescription or actual occupation by the claimant.

11. During the nineteenth and twentieth centuries ownership of the bed of the territorial sea came to be generally recognized without regard to prescription or actual occupation.

12. The charters given to the companies and individuals who were the proprietors and founders of the colonies which later became the defendant States granted

territory on the mainland bounded by the Atlantic Ocean but did not grant maritime sovereignty or dominion over a territorial sea, a concept then unknown, or property rights in the seabed or its resources.

13. The colonial activities in their marginal seas prior to 1776 were almost entirely limited to fishing in waters close to shore involving the use of shore-based facilities and to the regulation of these and other activities as carried on by the colonists therein. They did not involve any claim to ownership of the seabed.

14. The admiralty jurisdiction exercised by colonial admiralty courts prior to 1696 and by royal courts of admiralty sitting in the colonies after that date was not territorial in nature.

15. Colonial law and practice prior to 1776 do not support the claim that property rights to the seabed of the marginal sea seaward for 100 miles or any lesser distance had been granted to the colonies or that such rights were exercised by them except in a few cases where portions of the seabed within the three-mile limit were actually occupied.

16. When in 1776 the American colonies achieved independence and when in 1783 the Treaty of Peace was concluded neither the crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

17. From and after July 4, 1776, the date of independence, the United States of America, under the Continental Congress, under the Articles of Confederation and under the Constitution, constituted a union of internally independent states with a national government to which were delegated certain powers including the powers associated with external sovereignty such as the conduct of foreign relations, of defense and of foreign commerce.

18. If the English crown in 1776 had any remaining rights to sovereignty of the marginal seas and ownership of the seabed off the coasts of the colonies, which I do not find that it did have, those rights would have passed at independence and under the Treaty of Peace of 1783 to the national government as the holder of the external sovereignty of the United States and not to the several states.

19. If the states in 1789 had any rights to sovereignty of the marginal sea and ownership of the seabed off their coasts which they had received in any manner, which I do not find that they did have, those rights would have been lost to the national government upon their ratification of the Constitution.

20. Sovereign jurisdiction of the three-mile belt of territorial sea and ownership of its seabed became vested in the United States, rather than in the states, when, after 1776, the concept of the territorial sea was recognized and its extent defined by the national government.

21. The preponderance of the evidence in the present proceeding confirms the accuracy of the following statements of historical fact made by this Court in *United States v. California*, 1947, 332 U.S. 19, 31-33:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen v. Keyn*, 2 Ex. D. 63. . . ."

22. Prior to the Proclamation of September 28, 1945 by President Truman, 59 Stat. 884, rights to the resources of the seabed beyond territorial waters could be obtained only

on the basis of prescription or actual occupation and neither the United States nor the defendant States had made any such claim.

23. The Truman Proclamation of 1945 for the first time claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beyond the three-mile limit of the territorial sea off the coasts of the United States. The Proclamation initiated a new rule of international law in this regard.

24. This claim was validly made by and on behalf of the United States under its powers of external sovereignty and did not inure to the individual benefit of any of the Atlantic coastal states.

25. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, the United States confirmed to and vested in the defendant States the seabed and the resources of the territorial sea within three geographical miles of their respective coastlines. The right to the resources of the seabed in these areas being now vested in the defendant States, claims with respect thereto are not involved in this proceeding.

26. The Submerged Lands Act of 1953 validly limited to a width of three geographical miles the marginal band of sea the seabed of which it confirmed and vested in the defendant States, even though the Act granted to the states situated on the Gulf of Mexico seabed rights within their recognized historic boundaries out to three marine leagues.

27. Under the Truman Proclamation, the Outer Continental Shelf Lands Act of 1953, and the Convention on the Continental Shelf of 1964, the United States has the right, as against the defendant States, to the resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of territorial sea off the Atlantic coast.

28. The States of Rhode Island and North Carolina were not wholly independent nations and did not have external sovereignty during the period between the operative date of the federal government under the Constitution and the subsequent dates when they, respectively, ratified the Constitution.

29. The State of Georgia did not acquire the resources of the seabed under its boundary settlement of 1802 with the United States.

30. Since it does not appear that any exploration or exploitation of the bed of the continental shelf has been carried on by the licensee of the State of Maine or that any payments have been made by it to that State, an accounting by that State to the United States in that regard is not now required.

31. The United States is entitled to judgment in this proceeding.

32. The costs of suit, including the expenses of the special master, should be borne by the twelve defendant States in equal shares.

E. RECOMMENDED DECREE

In accordance with my findings and conclusions I recommend the entry of a decree in the following form:

It is now Ordered, Adjudged and Decreed as follows:

1. The United States is entitled as against the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to that portion of the seabed and subsoil, and the natural resources thereof, underlying the Atlantic Ocean and lying more than three geographical miles seaward from the coast line, that is, the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, out to the edge of the continental shelf.

2. The costs of this suit, including the expenses of the special master, shall be borne by the twelve defendant States in equal shares.

The foregoing report is respectfully submitted.

ALBERT B. MARIS
Special Master

Philadelphia, Pa.
August 27, 1974

F. APPENDIX

1. Consolidated and Revised Procedural Order as Amended

The special master having entered prehearing orders on July 28, 1970, October 27, 1970, and January 8, 1971 and an order on May 24, 1971 amending the order of July 28, 1970 in the above entitled case, and the Supreme Court having on June 28, 1971 severed the State of Florida from the case for all purposes so that that state is no longer a party, it is appropriate to revise the said orders to reflect the severance of the State of Florida from the case and to consolidate them into a single procedural order. To that end It Is Ordered:

Testimony of Expert Witnesses; Preparation

1. The testimony in chief of expert witnesses, including their statements of their training, experience and qualifications, shall be reduced to writing, preferably in question and answer form, and copies thereof shall be furnished to the special master and to counsel for the other parties not less than four weeks prior to the commencement of the hearing at which the witnesses are to be called upon to testify. All parties entitled to cross-examine a witness shall have the right to defer his cross-examination for a reasonable period of time, to be determined in each instance by the special master, in order to afford such parties an opportunity to study the testimony of the witness and to prepare for his cross-examination, except where such an opportunity is manifestly not required. All parties entitled to cross-examine a witness shall notify the proponent and the special master not later than one week prior to the commencement of the hearing at which his testimony is to be given whether they expect to cross-examine the witness at the conclusion of his direct testimony or to defer his cross-examination until a later session.

Exhibits; Documents; Distribution

2. Copies of exhibits proposed to be offered in evidence by a party or parties shall be furnished to counsel for the other parties at least four weeks prior to the commencement of the hearing at which the exhibits are to be offered in evidence. An exhibit comprising a handwritten document shall be accompanied by a typewritten or printed copy and an exhibit comprising a document written in a language other than English shall be accompanied by an English translation, certified in each instance by the custodian or translator, if practicable. In the case of exhibits which can readily be reproduced the United States shall furnish one copy to counsel for each of the states and the states shall furnish two copies to counsel for the United States and one copy to counsel for each of the other states. In the case of an exhibit which cannot be reproduced in numbers without undue expense, a single copy may be furnished to opposing counsel (in the case of the states to Covington and Burling, Esquires, common counsel for nine of the states, who have been designated by all of the states to receive such exhibits on their behalf), provided it is so furnished at least one month prior to the commencement of the hearing at which the exhibit is to be offered in evidence. All parties offering exhibits, other than those referred to in the fourth sentence of this paragraph, shall furnish one copy to the special master in addition to the original exhibit.

3. The States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia having retained Covington and Burling, Esquires, of Washington, D. C., as common counsel in this suit, prepared testimony, proposed exhibits and other documents and papers required to be furnished to counsel for other parties shall be furnished to Covington and Burling, Esquires, as well as to the Attorneys General of the nine states which they represent.

4. Except with respect to an exhibit referred to in the fourth sentence of paragraph 2, at the time an exhibit or other document is submitted to the special master by any party or parties, the party or parties submitting it shall furnish a copy to counsel for each other party (two copies to counsel for the United States), unless copies thereof have been furnished to counsel previously as provided by this order.

5. All copies of exhibits or other documents furnished to counsel for other parties under the provisions of this order shall be of the same kind and quality as the exhibits or documents which are submitted to the special master.

Designation of Exhibits

6. Exhibits shall be numbered by the parties for identification prior to being furnished to opposing counsel and offered in evidence. Exhibits offered in evidence by the United States shall be so designated and shall be numbered consecutively thus: "United States Exhibit No. ". Exhibits offered in evidence by the parties shall be designated with the name of the party and shall be numbered consecutively for each party thus: "Maine Exhibit No. ", or as the case may be. Exhibits offered in evidence by Covington and Burling, Esquires, as common counsel for nine of the parties shall be designated thus: "Maine et al Exhibit No. ", and shall be numbered consecutively.

Authentication of Exhibits; Effect; Objections

7. Copies of documents may be offered for introduction into evidence in lieu of originals. The authenticity of a document or the accuracy of a copy need not be proved if copies of the document have been submitted to all counsel for the parties as provided in paragraph 2 and if no party, at least two weeks prior to the commencement of the hearing at which the document is to be offered in

evidence requests the proponent to prove the authenticity of the document or the accuracy of the copy. Any party may, however, controvert by evidence the authenticity of such a document or the accuracy of a copy of it at any time.

8. An exhibit offered in evidence by a state or states shall be regarded as offered on behalf of all the states unless in the case of a particular exhibit a state notifies counsel for all the other parties and the special master that it does not rely upon the exhibit.

9. An objection made by one party to the testimony of a witness or to the admission of an exhibit shall be available to all other parties on the same side of the case without specific reference to them or reservation by them of the right to rely thereon. The special master will ordinarily rule upon objections to evidence or exhibits at the time the objections are made with leave to the objecting party, in case an objection is overruled, and if so advised, to make a motion to strike the testimony or exhibit after the examination and cross-examination with respect thereto have been completed.

Judicial Notice

10. A party proposing to ask the special master to take judicial notice of a document or other fact shall notify counsel for the other parties of such intention at least two weeks prior to the commencement of the hearing at which the request is to be made. If judicial notice of a document is involved, the notification to counsel for the other parties shall be accompanied by a copy of the document, if practicable.

11. All documents that are subject to judicial notice, copies of which are furnished to the special master and to counsel for convenience, shall be designated in the same manner as documents which the parties seek to offer for

introduction into evidence. The designation as exhibits of documents that are subject to judicial notice will in no way enhance their probative effect, however.

Reporter; Transcript of hearings

12. The parties have agreed to employ a competent reporter to report the special master's hearings. The parties will make their own arrangements with the reporter for the number of copies of the transcript, daily or otherwise, which each of them desires for its own use. In addition, the parties will arrange with the reporter to provide one copy of the transcript for the use of the special master in addition to the original provided for ultimate filing in the Supreme Court. The parties have agreed that Bruce C. Rashkow, Esq., and Elias Abelson, Esq., shall serve as a committee to supervise the work of the reporter and to provide for making necessary corrections in the preliminary transcript. All proposed corrections of the preliminary transcript shall be submitted to the committee within such time as may be directed by the committee or ordered by the special master.

Business Committee

13. The parties have agreed that physical arrangements, necessary personnel, financial arrangements and other administrative matters involved in the conduct of the hearings in these cases shall be dealt with on their behalf by a business committee consisting of Bruce C. Rashkow, Esq. for the United States, Robert G. Fuller, Jr., Esq. for the State of Maine, David H. Souter, Esq. for the State of New Hampshire, Kevin P. Curry, Esq. for the State of Massachusetts, W. Slater Allen, Jr., Esq. for the State of Rhode Island, Julius L. Sackman, Esq. for the State of New York, Elias Abelson, Esq. for the State of New Jersey, Jerome O. Herlihy, Esq. for the State of Delaware, Henry R. Lord, Esq. for the State of Maryland, Gerald L. Baliles,

Esq. for the State of Virginia, Jean A. Benoy, Esq. for the State of North Carolina, Edward B. Latimer, Esq. for the State of South Carolina, and Alfred L. Evans, Jr., Esq. for the State of Georgia. Robert G. Fuller, Jr., Esq. has been appointed chairman and Bruce C. Rashkow, Esq. co-chairman of the committee. It has been further agreed that the special master may confer from time to time with respect to any such matters with the chairman or co-chairman of the committee who will take them up with the committee for action.

Requests for Findings and Conclusions
[as amended March 7, 1974]

14. At times hereafter to be fixed by the special master following the close of the hearings, the parties shall submit to the special master their requests for findings of fact and conclusions of law and the special master before filing his report with the Court may submit a draft of his proposed findings of fact to counsel for all parties for the purpose of receiving their suggestions with respect thereto.

Prior orders rescinded

15. The prehearing order of July 28, 1970, as amended by the order of May 24, 1971, the second prehearing order of October 27, 1970, and the third prehearing order of January 8, 1971 are rescinded.

ALBERT B. MARIS
Special Master

August 27, 1971

TABLE OF CONTENTS

	Page
INTRODUCTION	1
EXCEPTIONS	4
SUMMARY OF ARGUMENT	6
I. NEITHER PRIOR DECISIONS OF THIS COURT NOR ANY PRINCIPLE OF CONSTITUTIONAL LAW FORECLOSES THE ATLANTIC STATES' RIGHT TO SEABED RESOURCES; AND STATE OWNERSHIP IS CONSISTENT WITH THE CONSTITUTION, THE HISTORIC UNDERSTANDING AND PRUDENTIAL CONSIDERATIONS	10
A. *CALIFORNIA* AND SUBSEQUENT DECISIONS OF THIS COURT DID NOT ADJUDICATE THE RIGHTS OF THE ATLANTIC STATES AND DO NOT JUSTIFY A GRANT OF SUMMARY JUDGMENT AGAINST THEM	10
B. OWNERSHIP OF THE SEABED AND ITS RESOURCES IS NOT AN APPURTENANCE OF "EXTERNAL SOVEREIGNTY" NECESSARILY VESTED IN THE UNITED STATES	15
C. STATE OWNERSHIP OF THE SUBMERGED LANDS IS CONSISTENT WITH THE CONSTITUTIONAL FRAMEWORK, THE COMMON UNDERSTANDING DURING MOST OF OUR HISTORY, AND COMPELLING STATE ECONOMIC AND REGULATORY INTERESTS	24
II. UNDER ENGLISH AND INTERNATIONAL LAW AND PRACTICE PRIOR TO 1776, THE MARGINAL SEAS WERE SUBJECT TO THE SOVEREIGNTY OF THE ENGLISH CROWN, AND THE RESOURCES OF THE SEAS AND SEABED BELONGED TO THE CROWN IN PROPERTY	30

Page

A. ENGLISH LAW AND PRACTICE PRIOR TO THE 17TH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE RESOURCES THEREOF 30

1. The Record Massively Supports the States' Position 31

2. The Master's Erroneous Methodology Undermines His Determination 35

3. The Master's Misconception of the Issues Led Him To Ignore Much of the Relevant Evidence . . . 37

B. ENGLISH LAW AND PRACTICE DURING THE 17TH CENTURY, THE PERIOD OF THE COLONIAL CHARTERS, FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS AND SEABED; AND NOTHING IN INTERNATIONAL LAW WAS TO THE CONTRARY 38

1. The English Seas Were Within the Realm of England 39

2. The 17th-Century English Admiralty Jurisdiction in the English Seas Was a Territorial Jurisdiction 41

3. The Crown Possessed the Legal Right To Exclude or To License Foreign Fishermen in the English Seas and the Right To Create Monopolies of Newly Discovered Fisheries; and All Fisheries in English Waters Were Subject to Regulation 44

Page

4. The Crown Owned the Seabed and Subsoil of the English Seas and the Resources Thereof 45

5. Under English and International Law in the Seventeenth Century, Maritime Sovereignty and Dominion Were Not Limited to Areas Effectively Occupied; a Uniform Belt of at Least 100 Miles Was Recognized, Subject to Adjustment in Cases of Special Historical Circumstances 47

C. ENGLISH SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS WERE NOT ABANDONED OR REPUDIATED EITHER BY ENGLISH LAW OR BY INTERNATIONAL LAW IN THE PERIOD 1688-1776 55

III. THE AMERICAN COLONIAL CHARTERS CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT THE SEABED RESOURCES OF THE MARGINAL SEAS OF THE COLONIES 63

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD NOT BEEN GRANTED SEA AND SEABED RIGHTS 63

B. THE OBJECTIVES OF BRITISH COLONIZATION REQUIRED THAT MARITIME SOVEREIGNTY AND DOMINION BE CLAIMED IN COLONIAL WATERS; AND IT WAS CLAIMED 66

C. THE CHARTERS EXPLICITLY CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT SEA AND SEABED RESOURCES 68

D. THE CONVEYANCE OF JURISDICTION, FRANCHISES AND ROYALTIES CONFIRMS THAT THE CHARTERS INCLUDED SEABED EXPLOITATION RIGHTS 73

Page

E. THE CHARTERS CONVEYED SEAS TO THE SAME DISTANCE TO WHICH ISLANDS WERE CONVEYED . . . 76

F. THE "FREE FISHING" CLAUSES CONFIRM THE OTHERWISE EXCLUSIVE MARITIME RIGHTS CONVEYED BY THE CHARTERS 78

G. MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR MARITIME SOVEREIGNTY AND DOMINION 79

H. THE RECORD ESTABLISHES A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE AMERICAN COLONIES 81

I. RIGHTS OF SOVEREIGNTY AND DOMINION WERE CLAIMED AND EXERCISED IN THE MARGINAL SEAS OF THE COMMON COUNSEL STATES DURING THE COLONIAL PERIOD 84

J. THE BRITISH AND DOMINION CASES RELIED ON BY THE MASTER WHOLLY FAIL TO SUPPORT HIS CONCLUSIONS 89

IV. THE STATES INDIVIDUALLY SUCCEEDED AT THE REVOLUTION TO ALL THE MARGINAL-SEA RIGHTS PREVIOUSLY HELD BOTH BY THE CROWN AND BY THE COLONIAL GOVERNMENTS, AND HAVE NEVER SURRENDERED TO THE FEDERAL GOVERNMENT THE EXCLUSIVE RIGHT TO EXPLOIT SEABED RESOURCES 94

A. THE STATES WERE INDIVIDUALLY SOVEREIGN DURING THE REVOLUTIONARY AND CONFEDERATION PERIODS AND INHERITED ALL RIGHTS OF SOVEREIGNTY AND DOMINION BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS . . . 94

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED 96

Page

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS, SHOW NO DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES IN WIDTH, AND ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES 99

D. THE EXCLUSIVE RIGHT OF THE STATES TO EXPLOIT CONTINENTAL-SHELF RESOURCES WAS NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION 102

E. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN THE MARGINAL SEAS AND SEABED 104

V. LEGAL DEVELOPMENTS BETWEEN 1787 AND 1945 DID NOT DESTROY THE EXCLUSIVE RIGHT OF THE COMMON COUNSEL STATES TO EXPLOIT THE RESOURCES OF THEIR CONTINENTAL SHELVES 111

A. PRESENT LAW, NOT PAST LAW, SHOULD BE THE TEST OF THE STATES' TITLE 112

B. THE THREE-MILE RULE DID NOT INVALIDATE THE STATES' TITLE TO SEABED RESOURCES 113

C. THE STATES' TITLE IS FULLY CONSISTENT WITH INTERNATIONAL LAW AND PRACTICE BOTH BEFORE AND AFTER THE TRUMAN PROCLAMATION . . . 116

D. INTERNATIONAL LAW AND PRACTICE DID NOT AND DOES NOT REQUIRE "OCCUPATION" IN ADVANCE OF DISCOVERY TO ESTABLISH PREEMPTIVE RIGHTS TO SEABED RESOURCES 120

Page

VI. THE STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO THE SHELF DID NOT ARISE UNTIL 1945; AND FEDERAL LEGISLATION CANNOT CONSTITUTIONALLY BE READ TO DEPRIVE THE STATES OF THEIR RIGHTS, WHETHER HISTORIC OR MODERN 130

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL-SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE 130

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION 133

C. THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF SEABED RESOURCES 136

CONCLUSION 139

TABLE OF CITATIONS

Page

Cases:

United States Courts

Alabama v. Texas,
347 U.S. 272 (1954) 20, 135

Askew v. American Waterways Operators,
411 U.S. 325 (1973) 28, 29, 30

Bank of Augusta v. Earle,
38 U.S. (13 Pet.) 519 (1839) 95

Boone v. Kingsbury,
206 Cal. 148, 273 Pac. 797 (1928) 107

Case v. Bowles,
327 U.S. 92 (1946) 17

Champlin Ref. Co. v. Comm'r,
286 U.S. 210 (1932) 136

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 95

Cooper v. Telfair,
4 U.S. (4 Dall.) 14 (1800) 95

Coyle v. Smith,
221 U.S. 559 (1911) 134

Durkee v. Duke,
375 U.S. 106 (1963) 11

Escanaba Co. v. Chicago,
107 U.S. 678 (1882) 134

Page

Georgia v. Pennsylvania R.R.,
324 U.S. 439 (1945) 15

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 24, 95

Harcourt v. Gaillard,
25 U.S. (12 Wheat.) 523 (1827) 98

In re Certain Land in Lawrence,
119 F. 453 (D. Mass. 1902) 139

Johnson v. McIntosh,
21 U.S. (8 Wheat.) 543 (1823) 51, 95, 98

Knapp v. Schweitzer,
357 U.S. 371 (1958) 24

Louisiana v. Mississippi,
202 U.S. 1 (1906) 28

Manchester v. Massachusetts,
139 U.S. 240 (1891) 26, 28, 93, 106

Martin v. Hunter's Lessee,
14 (1 Wheat.) 304 (1816) 24

Martin v. Waddell,
41 U.S. (16 Pet.) 367 (1842) 25, 51, 75, 76, 95, 103

Massachusetts v. New York,
271 U.S. 65 (1926) 51, 103

McIlvaine v. Coxe's Lessee,
8 U.S. (4 Cranch) 209 (1808) 95

Missouri v. Holland,
252 U.S. 416 (1920) 18

Page

Oklahoma v. Atkinson Co.,
313 U.S. 508 (1941) 138

Pennhallow v. Doane,
3 U.S. (3 Dall.) 53 (1795) 95

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 212 (1845) 8, 25, 98, 105

Poole v. Fleeger,
36 U.S. (11 Pet.) 184 (1837) 98

Preston v. Browder,
14 U.S. (1 Wheat.) 114 (1816) 95

Rhode Island v. Massachusetts,
37 U.S. (12 Pet.) 657 (1838) 95

St. Louis v. Western Union Telegraph Co.,
148 U.S. 92 (1893) 138

Sam Fox Publishing Co. v. United States,
366 U.S. 683 (1961) 11

Schacht v. United States,
398 U.S. 58 (1970) 136

Shively v. Bowlby,
152 U.S. 1 (1894) 75

Sim's Lessee v. Irvine,
3 U.S. (3 Dall.) 424 (1799) 95

Skiriotes v. Florida,
313 U.S. 69 (1941) 28

Smith v. Maryland,
10 U.S. (6 Cranch) 286 (1810) 95

Page

Sperry v. Florida ex rel. Florida Bar,
373 U.S. 379 (1963) 17

Stearns v. Minnesota,
179 U.S. 223 (1900) 134

Stockton v. Baltimore & N.Y. R.R.,
32 F. 9 (C.C. N.J. 1887), *appeal dismissed*,
140 U.S. 699 (1899) 138

Tennessee v. Davis,
100 U.S. 257 (1879) 17

United States v. Bevans,
16 U.S. (3 Wheat.) 336 (1818) 8, 103

United States v. California,
332 U.S. 19 (1947) . . 2, 3, 4, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 26, 37, 38, 61, 78, 87, 103, 105, 106, 107, 108, 110

United States v. Carmack,
329 U.S. 230 (1946) 138

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 95

United States v. Florida,
363 U.S. 1 (1960) 20

United States v. Hudson,
11 U.S. (7 Cranch) 32 (1812) 24

United States v. Louisiana,
363 U.S. 1 (1960) 6, 9, 12, 16, 20, 21, 29, 78, 101, 108, 113, 115, 131

United States v. Texas,
339 U.S. 707 (1950) 16

Page

Wayne County v. United States,
53 Ct. Cl. 417 (1918), *aff'd*,
252 U.S. 574 (1920) 138

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 95

Welsh v. United States,
398 U.S. 333 (1970) 136

Weston v. Sampson,
62 Mass. (8 Cush.) 347 (1851) 75

Workman v. Boone,
280 U.S. 517 (1929) 107

Yalobusha County v. Crawford,
165 F.2d 867 (5th Cir. 1947) 138

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 18

Zschernig v. Miller,
389 U.S. 429 (1968) 18

British and British Commonwealth Courts

Attorney General for British Columbia v.
Attorney General for Canada (1914) 56

Attorney General v. Philpott, in Moore,
A History of the Foreshore (3d ed. 1888) 64

Attorney General v. Trustees of the
British Museum, [1902] 2 Ch. 598 75

Bonser v. La Macchia,
43 Austr. L.J. Rep. 411 (1969) 89-90, 91

Page

Carr v. Francis Times & Co. [1902], A.C. 176, 181 92

Case of the Royal Fishery of the Banne (1610), Maine et al. Exhibit 157, p. 35 . . . . . 45, 46, 64

Dyke v. Walford, 5 *Moore's Rep.* 434 (Privy Council 1846) 75

Grabham v. Geales, 81 *Eng. Rep.* 995 (1619) 74

Harris v. Owners of the Steamship Franconia, [1876-77] L.R. Com. Pl. Div. 173 92

Regina v. Keyn, [1876], 2 Ex. D. 63 . . . . . 43, 56, 92, 93

Re Offshore Mineral Rights of British Columbia, [1967] 65 D.L.R. (2d) 364 . . . . . 89, 90

Secretary of State for India v. Chelikani Rama Rao, 43 L.R. Ind. App. 192 (1916) 93

Ship Money Case (Rex v. Hampden), 3 Howell, *State Trials* 825-1254 (1816) 40

International Courts and Arbitral Tribunals

Abu Dhabi Arbitration, 1 *International and Comparative Law Quarterly* (1952) 129

Bering Sea Arbitration Under the Treaty Between the United States of America and Great Britain Concluded at Washington February 29, 1892 . . . . 122, 124

Case of the S.S. Lotus, [1927] P.C.I.J., ser. A, no. 10 49

Page

Grisbadarna Case, The (Norway v. Sweden), Scott, *Hague Court Reports* (1916) 52, 72

North Sea Continental Shelf Cases, [1969] I.C.J. 1, 22 . . . . . 131, 132

Charters:

First Virginia Charter of 1606 . . . . . 81, 82, 88

New England Charter of 1620 . . . . . 26, 68, 69, 74, 81, 82

Second Virginia Charter of 1609 . . . . . 68, 71, 72, 76, 77

Third Virginia Charter of 1612 77

Statutes and Other Legislative Materials:

American

Articles of Confederation 95, 97

Calif. Stats. 1921, c. 303, p. 404 107

Calif. Stats. 1923, p. 593 107

Constitution of 1787 . . . . . 5, 6, 17, 24, 25, 102, 103, 104, 130, 134, 137

Article I, Section 8 25

Article IV, Section 3, Clause 2 . . . . . 8, 25, 102

Fifth Amendment 137, 138

Tenth Amendment 24

Page

Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills, 83d Cong., 1st Sess. 560 (1953) 22

Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939) 107

H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951) 110

H.R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H.R. 5992, at 1, 2, 3, 16 (April 21, 1948) 27

Outer Continental Shelf Lands Act, 43 U.S.C. §1333(a)(2) (1971) 19, 29, 136, 137

S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948) 27, 109

Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§1301-1315 . . . . . 5, 6, 9, 12, 16, 17, 19, 20, 21, 23, 24, 27, 37, 109, 134, 136, 137, 139

Truman Proclamation of 1945, 3 C.F.R. 67 (1943-48 Comp.) 111, 116, 121, 124, 126, 127, 128, 131

British

De Prerogativa Regis 73

James I's Fishing Proclamation of 1609 65

New England Restraining Act of 1775 89

Page

Territorial Waters Jurisdiction Act of 1878 92

Treaties

Peace of Paris of 1783 . . . . . 5, 8, 85, 98, 99

Treaty of Utrecht of 1713 . . . . . 85, 100, 101

Treatises and Miscellaneous

Angell, *Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (1826) 75, 106

Bartley, *The Tidelands Oil Controversy* (1953) 104, 107, 108

Bayliff, *Maryland's Boundary Controversies* (1959) 71

Borchard, "Jurisdiction Over the Littoral Bed of the Sea," 35 *Am. J. Int'l L.* (1941) 116, 118

Chalmers, *Opinions of Eminent Lawyers* (1st Am. ed. 1858) 75

Coke, *First Institute* (1628) 65

Colombos, *The International Law of the Sea* (6th rev'd ed.) 61

Council on Environmental Quality, *OCS Oil and Gas – An Environmental Assessment* (April 1974) 29

Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* (1919) 61, 114

Fulton, *The Sovereignty of the Sea* (1911) 35, 56, 57, 59, 113, 115

Gould, *The Law of Waters* (3d ed. 1900) 75, 107

Page

Hurst, "Whose Is the Bed of the Sea?", *Brit. Y.B. Int'l L.* (1923) 114, 115

Ireland, "Marginal Seas Around the States," *La. L. Rev.* (1940) 107

Jessup, *The Law of Territorial Waters* (1927) 115

Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* (1938) . . . 51

Lauterpacht, Sovereignty Over Submarine Areas, *Brit. Y.B. Int'l L.* (1960) 121

Maine, *International Law* (1888) 114

O'Connell, *International Law in Australia* (1965) 117

O'Connell, "The Jurisdictional Nature of the Territorial Sea," *Brit. Y.B. Int'l L.* (1971) 56, 60

Oppenheim, *International Law* (8th ed. Lauterpacht 1955) 33, 50, 61, 115, 121

Oxford English Dictionary (1933) 72

Oxford Universal Dictionary on Historical Principles (1955 ed.) 72

Parliamentary Debates, May 30, 1923, cols. 1265-66 115

Parliamentary Papers (1797) 89

Parry, *Consolidated Treaty Series* 44

Potter, *The Freedom of the Seas in History, Law and Politics* (1924) 56

Powell, "Fight of a Century Between the Penns and Calverts" (1932) 71

Page

Restatement, Judgments, §§ 68, 70, 93-1-1 (1942) 11

Selden, *Mare Clausum* (1635) 47, 48, 64

Story, *Commentaries on the Constitution* (5th ed. 1905) 51

U.S. Geol. Sur. Bull. 1212, *Boundaries of the United States and the Several States* 132 (1964) 71

Viner, *General Abridgement* (2d ed. 1792) 74

Waldock, "The Legal Basis of Claims to the Continental Shelf," 36 *Grotius Society* (1951) . . . 50, 115, 127

Whiteman (U.S. Dept. of State), *Digest of International Law* (1965) 43, 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*,

Defendants.

EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

INTRODUCTION

This Brief is submitted on behalf of the defendant States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia ("the Common Counsel States").[1]

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf.

[1] The other defendant States, North Carolina, South Carolina and Georgia, are separately represented. Throughout this Brief the term "State" is capitalized when it refers to a State of the United States, and not otherwise.

Plaintiff raised this issue by its complaint of April 1969 against all the Atlantic coastal States,[2] asserting an exclusive right on behalf of the federal government. The States each answered, claiming interests in the area in question, denying plaintiff's alleged exclusive right, and asserting exclusive rights to explore and to exploit on behalf of themselves.

The plaintiff thereupon moved for judgment on the ground that the States' claims were foreclosed by this Court's decision in *United States v. California*, 332 U.S. 19 (1947), and subsequent cases. The States opposed that motion and moved for reference of the case to a special master for the introduction of evidence bearing on the title and interest which they claimed. On June 8, 1970, the Court granted the States' motions and designated the Honorable Albert B. Maris as Special Master.

Extensive evidentiary proceedings were held before the Master. A total of 1,257 exhibits were introduced by all parties, comprising many thousands of pages.[3] The parties presented a total of ten expert witnesses on English, colonial and international law and legal history and other relevant subjects; the transcript comprises 2,800 pages. Extensive cross-examination of these witnesses was con-

---

[2] The State of Florida moved for and obtained severance of the action against it on the ground that its situation raised distinct issues. Florida's case was tried separately and is now also before this Court, Original No. 52. The defendants in this action are thus the Atlantic coastal States other than Florida.

[3] A list of the 827 Exhibits introduced by the Common Counsel States appears at Appendix (App.) 559-640. In this Brief, Exhibits of the Common Counsel States will be cited to the Appendix if they are reproduced therein, and otherwise cited as "Exhibit ____." Exhibits of other parties are identified by the name of the party. Portions of the Transcript not reproduced in the Appendix are cited as "Tr. ____." In quotations and in the Appendix, footnotes are normally omitted.

ducted. The record herein represents the first and only evidentiary record ever amassed on the basic issue of State versus federal title in any of the continental-shelf litigation from the *California* case onwards.

The Master issued his Report on August 27, 1974. He concluded that, notwithstanding this Court's reference to him, he was bound by the Court's decision in *California* to decide in favor of the plaintiff by granting plaintiff's outstanding motion for judgment. The Master also concluded that the evidentiary record did not compel a departure from the *California* doctrines as he understood them so as to warrant a recommended decision in favor of the States.

The Common Counsel States' Exceptions to the Master's Report are stated immediately below, and their Brief on the merits follows. The Brief is, of necessity, lengthy. This litigation involves issues unusually large in number, broad in scope and momentous in their consequences. The record covers complex developments of history and legal history spanning several centuries.

For the assistance of the Court we also file a Supplemental Brief ("S.B."), consisting essentially of our Post-Trial Brief to the Master, in which arguments are developed and the record is analyzed more fully than is possible in this Brief. In general, in this Brief we refrain from detailed discussion of and citations to the historical evidence, but rather refer the Court to the portions of the Supplemental Brief where the full discussion and references are set forth. The Appendix, in turn, consists of a bare minimum of selections from the record, giving only an indication by way of sample of the types of material contained in the original record which, in our submission, establishes the States' claims.

EXCEPTIONS

The Common Counsel States except to the following findings and conclusions in the Master's Report:

1. The United States' motion for judgment should be granted on the basis of *United States v. California* and subsequent cases (Report, pp. 8-21).

2. As a matter of law, ownership of the continental shelf is an appendant of "external sovereignty" and is thus vested in the United States (pp. 22-24, 78 §§ 18, 19).

3. All new rights created in and after 1945 in the continental shelf arose on behalf of the federal government, not the States (pp. 68-71, 80 §§ 24, 26, 27).

4. Historical evidence demonstrating the assertion and exercise of English, colonial and state sovereignty and dominion over the three-mile belt is irrelevant to the issues in this litigation (pp. 24-25, 58, 80 § 25).

5. The sovereignty and dominion over the English seas which formed part of English law before 1603 was "protective" only, not involving territorial sovereignty, property rights, admiralty jurisdiction over foreigners or control of fisheries (pp. 27-29, 75 §§ 1, 2, 6).

6. The English seas were not, as a matter of English law, within the realm of England in the 17th century (p. 35).

7. The admiralty jurisdiction in the English seas in the 17th century was not a "territorial" jurisdiction (pp. 31-33, 75 § 5).

8. English and international law in the 17th century limited sea and seabed ownership to what was occupied in fact at any given time by the navy of the state asserting ownership, and there were no recognized boundaries to the seas which were subject to crown ownership (pp. 35-40).

9. Between 1688 and 1776 crown ownership of the seabed disappeared from English law and ceased to be countenanced by international law (pp. 39-47, 75-76 §§ 4, 6-8, 10).

10. The American colonial charters did not convey sovereignty and dominion in the marginal seas and seabed (pp. 47-56, 76-79 §§ 12, 21).

11. The crown and the American colonies did not claim or exercise rights of sovereignty and dominion in the marginal seas and seabed during the colonial period (pp. 56-60, 77 §§ 13-16, 78-79 § 21).

12. At some time—either at independence, by the Articles of Confederation, by the Peace of Paris, or by ratification of the Constitution—the States intended to surrender, and did surrender, any rights of sovereignty and dominion in their marginal seas and seabed which they posessed to the federal government (pp. 60-65, 77-79 §§ 17-21, 81 § 28).

13. After the disappearance of 17th-century claims international law recognized no territorial or property rights in the seabed of the marginal sea beyond three miles except in a few isolated cases where rights were based on strict occupation; and the formulation of the continental-shelf doctrine in and after 1945 created wholly new rights out of nothing (pp. 42-43, 46, 53-54, 65-71, 76 §§ 9, 11, 78-80 §§ 21-23).

14. The Submerged Lands Act, construed as limiting the Common Counsel States to a three-mile belt of ownership while permitting the Gulf States to establish ownership out to ten miles, is constitutional (pp. 71-72, 80 § 26).

15. The plaintiff is entitled to judgment (p. 81 § 29).

SUMMARY OF ARGUMENT

1. This Court has not heretofore determined whether the Atlantic coastal States or the federal government possess the right to develop the mineral resources of the continental shelf. Nevertheless, the Master ruled that *United States v. California*, 332 U.S. 19 (1947), required judgment for the federal government, since he read that decision to make ownership rights a necessary adjunct to federal foreign-affairs and defense powers. This ruling misreads *California*. Its premise is patently unsound since the express federal powers over foreign affairs and defense are ample to secure federal interests in the continental shelf, just as on land, without any need for the property itself to be federally owned. Any such "inseparability" concept was repudiated by Congress in the Submerged Lands Act and by this Court in *United States v. Louisiana*, 363 U.S. 1 (1960).

The plaintiff seeks judgment as a matter of law on the different but equally unsound ground that *California* found as a historical fact that the Atlantic States did not own the resources of the seabed along their coasts. On the contrary, *California*—because of the nature of the equal-footing claims advanced by the State—focused on whether there existed a uniform three-mile belt in the 18th century, and the States' claims here rest on no such premise. Also, the ruling in *California* derived from a lack of evidence, not a definitive historical finding, and the States have here produced massive evidence in support of their historic claims.

The States' historic claims in this case are, moreover, supported by a presumption of validity. Under the Constitution, the States are residual owners of property. The common understanding for a century and a half was that the States owned the submerged lands adjacent to their coasts. Extensive practice, including State grants of sub-

merged lands to the federal government, confirmed this understanding. State ownership will merely compensate for the expenses which development imposes on the coastal States.

2. The States' title traces back to colonial charter grants and is reinforced by the historical background and context of those grants. Extensive evidence shows that English law and practice prior to and during the 17th century, in which the grants were made, recognized the sovereignty and ownership by the crown of the English seas and their resources. International law in this period had not established any consensus inconsistent with such claims to ownership of the resources of the sea. Against this background it would be astonishing if similar rights had not been granted and established in the American colonies, and the evidence shows that they were.

Colonial charters, in the most explicit terms, conveyed to the colonies extensive rights to the resources of the sea and seabed for wide distances in the Atlantic, generally to 100 miles. This reading of the charters accords with contemporaneous usage, with the objectives of the crown in chartering the colonies, and with prevailing English law and practice. It is confirmed, in addition, by contemporaneous documents construing the charters, by contemporaneous maps, and by extensive colonial practice involving the exploitation of ocean resources. This evidence, referred to below and elaborately documented in the Supplemental Brief and Appendix, is overwhelming.

The Master's disagreements with the States' evidence are, on individual examination, without merit. Further, his own assertions are vitiated by repeated reliance on selected secondary sources representing minority views inconsistent with the copious primary sources supporting the States' position, and by his misreading of *California* to render irrelevant the extensive historical evidence relating to law

and practice within the three-mile belt. The Master's reliance on several British and dominion decisions is demonstrably infirm when the actual opinions in those cases are examined.

3. At the Revolution the colonies became independent sovereign States and succeeded to all rights granted under the colonial charters, including rights to sea and seabed resources. In addition, the States inherited, as successors to the English crown, any residual interest of the crown in the sea and the seabed not previously granted, so that the States' ownership claims are established no matter how the earlier charters may be construed. Even if, contrary to historical fact, the States are not deemed to have been independent sovereigns, they unquestionably inherited colonial and crown rights to property, including seabed resources. State ownership of the sea and its resources is confirmed by the Peace of Paris and related maps and documents.

The Master is mistaken in his conclusion that any ownership rights of the States to the seabed were transferred to the federal government on ratification of the Constitution in 1789. Any such implied transfer is squarely inconsistent with Article IV, Section 3, of the Constitution, which prevents, and was expressly intended to prevent, any implied transfer of State property interests to the federal government. This Court rejected a comparable claim of implied transfer based on the admiralty jurisdiction (*United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818)), and its own subsequent decisions confirmed that the States are residuary owners of property including the lands lying below navigable waters. *E.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

4. The Master ruled that the emergence of the three-mile limit in the period between 1789 and 1945 worked a contraction of any existing States' rights to the submerged lands,

and that the rights to the shelf now recognized under international law arose after 1945 on behalf of the federal government. The States, no less than the federal government, are entitled to have their rights measured by international law as it exists today, a position this Court itself adopted in *United States v. Louisiana, supra,* 363 U.S. at 33-34. In any event, an overwhelming preponderance of authority, including leading experts in international law, confirms that the three-mile limit related fundamentally to surface navigation and related rights; and its basic rationale could not affect the historic claims of the States to develop the mineral resources of the seabed.

5. Even if exclusive rights to the shelf are deemed to have arisen in 1945 for the first time, the States would be entitled to those rights. The States are unquestionably the residual owners of property within their land territories to which the continental-shelf rights are an "inherent" appurtenance. Alternatively, at the very least, the Atlantic States are entitled to prove their historic boundaries out to three leagues under the Submerged Lands Act, which would be unconstitutional if construed to deny them this right. Similarly, if the Act is read—contrary to Congress' recognized purpose—to deny the States property rights which they possess by historic title or otherwise, that statute would be *pro tanto* unconstitutional.

I.

NEITHER PRIOR DECISIONS OF THIS COURT NOR ANY PRINCIPLE OF CONSTITUTIONAL LAW FORECLOSES THE ATLANTIC STATES' RIGHT TO SEABED RESOURCES; AND STATE OWNERSHIP IS CONSISTENT WITH THE CONSTITUTION, THE HISTORIC UNDERSTANDING AND PRUDENTIAL CONSIDERATIONS.

A. *CALIFORNIA* AND SUBSEQUENT DECISIONS OF THIS COURT DID NOT ADJUDICATE THE RIGHTS OF THE ATLANTIC STATES AND DO NOT JUSTIFY A GRANT OF SUMMARY JUDGMENT AGAINST THEM.

It has been the position of the plaintiff from the outset that this case is controlled by *United States v. California*, 332 U.S. 19 (1947), and its progeny so that this Court and the Master were obliged to decide this case in its favor on the basis of statements made in these earlier decisions.[4] The Master accepted this argument and held that as a matter of law the plaintiff was entitled to summary judgment on its motion made originally in this Court and renewed before the Master (Report, p. 21).

The plaintiff's position has been that the decision of this Court in *California* rested on reasoning that "required" the Court to decide whether the Atlantic States had any rights in the seabed or resources beyond the low-water mark (Pl. Br., p. 10). Primarily, the plaintiff argued that *California* determined as a matter of historical fact that the Atlantic colonies and States never acquired ownership of the submerged lands or natural resources of the seabed seaward of the low-water mark (*id.* at 19). Plaintiff concluded that, as a result of *California*, the Supreme Court has "already resolved" adversely to the Atlantic States their contentions that they own the resources of the Atlantic seabed beyond territorial waters (*id.* at 10, 28).

---

[4] See Motion of the United States for Judgment and Brief in Support of Motion, pp. 21-24, 28-30; Post-Trial Brief for the United States Before the Special Master, pp. 8-16 (hereafter "Pl. Br.").

Taking a different route to the same destination, the Master agreed that judgment for the plaintiff should be granted as a matter of law based on *California*, but he adopted a somewhat different reading to sustain that view. He concluded that, primarily, *California* held as a matter of law that the seabed and its resources seaward of the low-water mark were affected by a "national concern for defense, international relations and foreign commerce" that made ownership of the resources attributes of federal external sovereignty rather than of State sovereignty (Report, pp. 12, 14, 21). Taking *California* to establish a rule of law, he declared it to be binding upon him, unless and until it was modified by the Court (*id.* at 10, 21).

Contrary to the arguments of the plaintiff and the conclusion of the Master, the issues in this case are in no way foreclosed by *California* or any other prior decision of this Court. First, it is common ground that this Court has never previously adjudicated the rights of the Atlantic States to the Atlantic seabed or its resources seaward of the low-water mark. This is in substance conceded both by the defendant (Pl. Br., p. 10) and by the Master (Report, p. 21). With exceptions not here relevant, it is well settled that a stranger to litigation is not concluded by its resolution of either factual or legal issues.[5] None of the Common Counsel States was a party to *California*.[6]

Second, the constitutional doctrine that the Master imputes to *California* has clearly been undermined, disap-

[5] Durkee v. Duke, 375 U.S. 106, 115-16 (1963); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961); Restatement, Judgments, §§ 68, 70, 93-1-1 (1942).

[6] In this connection, it should be noted that Massachusetts sought leave to intervene in the *California* case and the plaintiff, in successfully opposing that intervention, stated to the Court that "Massachusetts cannot be affected by any judgment which may be entered in that suit." Memorandum in Opposition to Motion of Massachusetts for Leave To Intervene, p. 1.

proved, and repudiated by subsequent developments that cannot be ignored. On the Master's view the seabed and seabed resources of the continental shelf were held in *California* to be so inextricably related to the plaintiff's constitutional functions of defense, foreign affairs and foreign commerce that federal ownership of the resources was a necessary attribute of those powers. We shall show below that both the Congress and this Court subsequently acknowledged that there is no such inseparable relationship, since the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.*, sustained by this Court in *United States v. Louisiana*, 363 U.S. 1, 10 (1960), established the feasibility of separating federal constitutional powers from such ownership rights. See, *e.g.*, Section 6(a), 43 U.S.C. § 1314(a).

Even apart from these developments, we shall show that it cannot be plausibly maintained that the existence or exercise of federal constitutional powers requires federal ownership of seabed resources. Federal regulatory power is fully adequate to secure federal interests and no more requires plenary federal ownership of submerged lands than it requires that all property within the continental United States be owned by the federal government. If a contrary view is attributed to *California*, then reexamination of that view would certainly be warranted in light of the evidence adduced in this case. In point of fact, subsequent decisions of this Court clearly indicate that the Master's reading of *California*, as requiring federal ownership as a necessary attribute of federal power, is moot.

Third, apparently recognizing the weakness of such a constitutional argument, the plaintiff has chosen to read *California* as resting largely or exclusively upon a historical determination that the Atlantic States lacked property rights in the seabed or its resources seaward of the low-water mark on the Atlantic coast.[7] However, the Court's

[7] In its reply brief to the Master, the defendant went so far as to assert that *California* was "grounded in historical analysis" and that

analysis in *California* did not purport to make any definite determination that the Atlantic States lacked ownership rights in the seabed resources; it stated that on the materials available to it "we cannot say" that the thirteen original colonies "acquired ownership to the three-mile belt" and that neither charters, treaties "nor any other document to which we have been referred showed a purpose to set apart a three-mile ocean belt for colonial or state ownership." 332 U.S. 31-32. Since any historical judgment made by the Court in that case was specifically grounded on a lack of evidence, certainly *California* cannot be read to predetermine the result of a new inquiry made on the basis of a quite different record.[8] The Atlantic coastal States, which clearly are in the best position to supply evidence relating to their historic title, presented no evidence in *California* since they were not parties.

Moreover, as the statements quoted from *California* show, the historical issue posed by *California* in that case was entirely different from the historical issues posed here. California's "equal footing" argument led it to seek to establish that during the colonial and federal period the Atlantic coastal States were possessed of a uniform three-mile belt in the ocean along their respective coasts. Conversely, in rejecting the argument this Court emphasized the lack of uniformity in ocean-related claims in that period and the assertion of different types of American and foreign

---

the Court had not even suggested that the external sovereignty of the federal government was inseparable from seabed ownership (pp. 5, 148, 149).

[8] The plaintiff has asserted that certain of the documents introduced by the States in this case were also made available to the Court in *California*, but we believe that an examination of the testimony and evidentiary materials contained in the Appendix of the Common Counsel States will readily demonstrate that the evidentiary record made here goes far beyond the collection of references or documents supplied in *California*. It was precisely in order to compile such an evidentiary record that the States here, unlike California, sought a reference to a Master.

jurisdictional claims extending well beyond the three-mile limit. 332 U.S. at 32 & n.15. The Common Counsel States in this case have never claimed any such uniform three-mile belt as a matter of historic right; they agree that no such fixed, uniform belt existed in colonial times; and their claims derive from historical sources that have no relation to any supposed three-mile belt.

Finally, the assertion that *California* forecloses further consideration of the present case is inconsistent with this Court's own reference of this case to a Master. In its motion for judgment prior to the reference, the plaintiff made essentially the same arguments for foreclosure that it repeated to the Master in renewing its motion for judgment as a matter of law. The Common Counsel States argued in this Court, in opposition to granting the plaintiff's motion and in support of their own motion for reference to the Master, that the plaintiff's claim was invalid on the several grounds just described. We respectfully submit that this Court's reference of the case to the Master, leading to extensive evidentiary proceedings over several years, was not intended as an idle gesture or prelude to a grant of the plaintiff's motion but represented a rejection of the plaintiff's motion for judgment as a matter of law.

The Master, as his Report shows, regarded himself as bound by *California* to grant the plaintiff's motion for judgment, and his historical analysis was made with the explanation that it should be available in the event that the Court might decide to reconsider the rule of law assertedly established in the *California* case (Report, p. 21). Although for the reasons already stated we believe that the Master erred in believing himself controlled by *California*, there can be no dispute about his further observation: this Court is always free to reconsider its prior decisions, especially where great interests and constitutional principles are involved. Thus, even if the Master were right in his assumption that *California* dictated his result, the doctrine of that

case would be open to scrutiny here since there has been no prior adjudication of the claims of the Atlantic coastal States.

The Master's view that he was controlled by *California* is, however, not irrelevant in considering assertions made by him in subsequent portions of his Report. The Master readily concedes that he felt himself obliged to decide the case in favor of plaintiff whatever might be his own view of the situation (Report, pp. 9-10). With great respect we submit that this appraisal, which in our view is entirely mistaken, permeates the Master's Report. In particular, it makes it appropriate for this Court to give special attention to the actual record evidence in this case which is presented for its consideration. Thus, here, even more than in the usual original-jurisdiction case referred to a Master, "this Court has the duty of making an independent examination of the evidence." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting).

B. OWNERSHIP OF THE SEABED AND ITS RESOURCES IS NOT AN APPURTENANCE OF "EXTERNAL SOVEREIGNTY" NECESSARILY VESTED IN THE UNITED STATES.

The Master concluded in this case that "the most fundamental ground of the rule" in *California* was that federal power required federal ownership of the seabed and its resources. He described this "fundamental ground" as follows:

> "[T] he territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the 'protection and control of which has been and is the function of national external sovereignty' [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and . . . an incident

> to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea" (Report, p. 14).

Plaintiff has, as noted, sought to minimize or eclipse this asserted ground of decision; it prefers to read *California* as having rejected State claims on historical grounds and to have referred to federal powers merely to establish a federal title arising subsequent to the colonial period (*e.g.*, Pl. Br., p. 5). Like the plaintiff, the Common Counsel States believe that the references to federal powers and sovereign authority were not regarded as an independent ground for the Court's rejection of California's position, let alone the primary or fundamental ground gleaned by the Master.

If foreign-policy or defense considerations overrode an otherwise sound State title to seabed resources, the reasoning subsequently employed by the Court in *United States v. Texas*, 339 U.S. 707 (1950),[9] would be inexplicable. In that case, the Court held that Texas's claims were defeated by "equal footing" principles. If the Court had intended in *California* that foreign-policy or defense powers of the federal government necessarily required federal ownership of the submerged lands, then resort to equal-footing principles would have been quite unnecessary.

Nevertheless, the Master's reading of *California*, as well as certain oblique statements in that decision,[10] make it necessary to address at the outset and refute the

---

[9] Similarly, if federal sovereignty required federal ownership the Court could not subsequently have sustained the grants under the Submerged Lands Act of such resources to the States as it did in United States v. Louisiana, 363 U.S. 1, 10 (1960). See pp. 19-21, *infra*.

[10] The Court in *California* made reference to the necessity that "a government next to a sea must be able to protect itself from the dangers incident to its location"; it referred to the governmental interests in revenues, health, and neutrality; it took note of the possibility of international disputes and settlements concerning the resources of the

proposition that federal power granted by the Constitution makes necessary and inseparable federal ownership of seabed resources. With great respect, we submit that such a proposition cannot withstand rational examination. In addition, it cannot be squared either with the congressional judgment underlying the Submerged Lands Act or with this Court's action in sustaining that statute.

In substance, the Master reads *California* to say that because resources-development activity on the continental shelf may affect the military, diplomatic and commercial posture of the United States, it follows that the United States rather than the States must own the resources to be developed. The obvious and fatal difficulty with this view is that under this Court's decisions the federal government has preemptive regulatory power to regulate all activities — whether of States, corporations or individuals — to the full extent necessary to carry out its express responsibilities under the Constitution.[11]

Thus, the federal foreign-relations power overrides any State action that would create international problems, interfere with foreign policy or cause international embarassment; the defense power, properly executed by the federal government, gives the national government authority to control the deployment of all natural resources, wherever located, to insure the national defense; the treaty power allows the United States to make international

---

seabed, including "the very oil about which the state and nation here contend"; and the Court emphasized, as no one denies, that it is the federal government rather than the States that is entrusted with power over defense and foreign affairs. 332 U.S. at 35-36.

[11] *E.g.*, Tennessee v. Davis, 100 U.S. 257 (1879); Case v. Bowles, 327 U.S. 92 (1946); Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).

agreements which supersede state law.[12] These and similar federal powers give the federal government full power to secure federal interests by treaties, legislation and regulation, including all legitimate interests affecting or affected by the development of submerged lands.

Such federal interests do not suggest, let alone require, federal *ownership* of submerged lands any more than they make it necessary for the federal government to own all property within the United States. Wars may be fought on land as well as by sea, and the resources of the land are no less vital to defense than those of the sea. Activities and property on land, no less than the resources of the seabed, may be and often are the subject of international dispute and settlement. No one has ever suggested, however, that federal ownership of all property within the United States was necessary for the national government to fulfill its defense, foreign-affairs, or commercial functions. "The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." *United States v. California*, 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

Before the Master the plaintiff argued that there are "legal and factual differences" between the land and sea which render the comparison inapt (*e.g.*, Pl. Br. 150). It has, however, never identified any difference that remotely qualifies or draws in question the power of the federal government to regulate, so far as is necessary to secure federal interests, any and all development activities undertaken by the States or State licensees in the submerged lands.[13] So long as this power exists, it is impossible to

---

[12] *E.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Missouri v. Holland, 252 U.S. 416 (1920).

[13] The only difference even adverted to by the plaintiff's reply brief is the extensive power enjoyed by the federal government over resident

conclude that State ownership can frustrate any legitimate interest of the federal government in defense policy, foreign affairs, or any other matter.

Our position that the existence and exercise of the federal government's powers over foreign policy, defense and commerce does not require ownership of the seabed and its resources has been accepted in substance by both Congress and this Court. In 1953, Congress enacted the Submerged Lands Act, by which it "recognized, confirmed, established, and vested in and assigned to" the coastal States the submerged lands and resources within a three-mile belt around the United States or, where a statutory historical test could be met by the Gulf States, a three-league belt in the Gulf. Sections 2, 4, 43 U.S.C. §§ 1301, 1311. The Act simultaneously reserved to the federal government a variety of rights including sovereign authority for purposes of commerce, navigation, national defense and international affairs. See, *e.g.*, Section 6(a), 43 U.S.C. §1314(a). Plainly, Congress saw no difficulty in separating federal sovereign powers from proprietary interests in the submerged lands.[14]

---

aliens within the United States and the more limited jurisdiction exercised over such persons beyond the territorial sea (Pl. Reply Br. 150). How this difference can have any bearing on the question of federal versus State ownership is not, and cannot be, explained.

[14] Plaintiff's witness Professor Henkin conceded that no international problems or foreign-relations embarrassment have arisen from State ownership of the three-mile and three-league belts since 1953. Tr. 2647.

The plaintiff seeks to derive some comfort from the Submerged Lands Act by arguing that, at the very least, the companion Outer Continental Shelf Lands Act confirmed the claims of the United States to land lying beyond the three-mile/three-league limit (Pl. Br., pp. 16-18). See Sections 3-4, 43 U.S.C. §§ 1332-33. In fact, the Submerged Lands Act proceeded on the premise that the States' historic claims to adjacent submerged lands should be respected, and there is no expressed intent to cut off such claims as might extend beyond the three-mile/three-league limit. See pp. 136-37, *infra*. Congress also provided

Thereafter, in *Alabama v. Texas*, 347 U.S. 272 (1954), this Court sustained the validity of the Submerged Lands Act so far as it recognized State ownership of, and relinquished federal claims to, the three-mile/three-league belt, and the Court subsequently confirmed the claims of Florida and Texas to three leagues in the Gulf under the historical standard established by the Act. *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). If, as the Master supposed, the *California* decision required federal ownership of the submerged lands as a necessary attribute of federal powers, then the Submerged Lands Act would not have been sustained by the Court and claims of Texas and Florida to the three leagues could not have been confirmed.[15] Consequently, either *California* did not rest on any ground of necessary federal ownership of the submerged lands or that that ground of *California* has been reconsidered and rejected *sub silentio*. In either event, the Master erred in concluding that there now exists any rule of law requiring, as a matter of constitutional principle, that the federal government own the resources of the seabed.

---

in the Act that a provision approving and confirming a three-mile boundary for the original coastal States was without prejudice to the States' claim if any of their boundaries extend beyond that line. Section 4, 43 U.S.C. § 1312.

[15] The view that a majority of the Court did not read *California* as resting on any constitutional principle of necessary ownership is underlined by Mr. Justice Black's separate opinion in Alabama v. Texas. Mr. Justice Black—the author of the *California* decision—dissented from the Court's per curiam validation of the Submerged Lands Act, asserting that the case raised difficult and serious questions respecting Congress' right to relinquish "elements of national sovereignty" over the ocean. 347 U.S. at 279. Thereafter, in a separate opinion in the *Louisiana* case, Mr. Justice Black resolved his own doubts by expressly rejecting the federal government's argument that "the State's interest in the marginal seas must be determined in accord with the national policy of foreign relations." He stated that "[e]verything in the very extended congressional hearings and reports refutes any such idea." 363 U.S. at 90.

Testimony before Congress in enacting the Submerged Lands Act not only confirms that State ownership is compatible with federal power, but underlines the fact that Congress explicitly made this judgment in framing the Act. A striking example, noted by the Court in its own *Louisiana* opinion, involved the contention that the federal government might be embarrassed in its diplomatic relations by permitting States to exercise rights in submerged lands beyond three miles, as the Act clearly contemplated in the case of Gulf States meeting the Act's historical test. Mr. Justice Harlan's opinion for the Court explained:

> "The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Advisor to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve." 363 U.S. at 30-31.

Other testimony similarly confirmed that there was no inconsistency between State ownership and any of the federal powers referred to in the *California* case.[16]

---

[16] For example, the Secretary of the Navy, Robert B. Anderson, made it clear that it was not necessary in relation to federal defense

At the hearing before the Master, the Common Counsel States introduced the testimony of a highly qualified expert witness—Lyman B. Kirkpatrick, Jr.[17]—to confirm that the functions of the federal government in defense, foreign relations, and allied fields do not require federal ownership of the submerged lands. Mr. Kirkpatrick reviewed the history of this country's claims over the continental shelf vis-a-vis foreign nations and the distinction repeatedly drawn by the federal government itself between that question and the separate question of federal versus State ownership. He explained in detail how the foreign-relations and defense powers of the federal government were adequate to protect its legitimate interests regardless of State ownership of the submerged lands (App. 4-10).

---

policy for the United States rather than the States to own petroleum resources of the seabed. He testified:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which the oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I certainly assume it would, Senator."

Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills, 83d Cong., 1st Sess. 560 (1953).

[17] Mr. Kirkpatrick, currently a University Professor at Brown University specializing in political science, has been connected with foreign relations and defense policy throughout his professional life. He assisted in the formation of the Central Intelligence Agency and served both as its ranking official responsible for intelligence and as its Inspector General. He has written on military affairs and lectured regularly to the State Department's Foreign Service Institute and the Army War College. App. 1-4.

In addition, Mr. Kirkpatrick noted that petroleum exploration will almost certainly be carried on by private parties whether they are licensed by the federal government or the States (App. 10). To be sure, disputes may arise with foreign countries concerning the continental shelf and treaties may be made between this country and others on this subject. However, he noted that such disputes are scarcely more remarkable than those that arise regularly "respecting American vessels in foreign ports, American property in foreign countries, and property subject to contract between Americans and foreign nationals" (App. 9). Similarly, State ownership cannot block any proper treaty the federal government may promote or adopt to govern the seabed (App. 10-11).[18]

Against this background, it is unnecessary to argue at greater length that State claims to ownership of submerged lands are compatible with the existence and exercise of federal constitutional powers. This compatibility has been acknowledged explicitly by Congress in the Submerged Lands Act and, at least implicitly, by this Court's subsequent decisions sustaining and applying the statute. The plaintiff in this very case appears to renounce any reliance on a supposed inseparability of federal power and ownership of the submerged lands (*e.g.*, Pl. Post-Hearing Reply Br. 148-49). So far as the Master has relied upon a contrary reading of *California*, his Report errs and must be disaffirmed.

Certainly there can be no suggestion that, as a matter of constitutional law or policy, State ownership is permissible

[18] Mr. Kirkpatrick gave similar testimony relating to military aspects of the sea, seabed, and development of seabed resources (App. 15-18). He noted that ownership of the three-mile belt immediately adjacent to the coasts has been confirmed in the States even though it is "the area of the sea frontier traditionally regarded as most critical to the defense of the United States" (App. 17).

within a three-mile belt but not beyond. Both Texas and Florida have already been allowed greater distances. In any event, the significance of the Submerged Lands Act is not the precise distance it fixes, but rather its recognition that federal powers over defense, foreign relations, and commerce can be distinguished from any question of ownership and amply exercised even though ownership be confirmed in the States. As a matter of reason, the same rationale must apply fully beyond the three-mile/three-league limit.

C. STATE OWNERSHIP OF THE SUBMERGED LANDS IS CONSISTENT WITH THE CONSTITUTIONAL FRAMEWORK, COMMON UNDERSTANDING DURING MOST OF OUR HISTORY, AND COMPELLING STATE ECONOMIC AND REGULATORY INTERESTS.

Federal ownership of the seabed and its resources is not only unnecessary under the Constitution but is contrary to the spirit and approach of the Constitution which makes the States the residuary owners of public lands otherwise unallocated. State ownership of the submerged lands is reinforced both by the common understanding from the outset of our history as a nation and by the regulatory and economic interests of the coastal States in relation to submerged lands. In short, the constitutional presumption strongly supports the States' claims in the present case.

A basic constitutional principle of the union is that the federal government is one of granted or delegated powers, while the States and their citizens are the residuary possessors of all sovereign powers and rights not ceded to the federal government. This proposition respecting the allocation of powers is so well settled that extensive citation is unnecessary.[19] The proposition is no less true with respect to property.

[19] See U.S. Const., Xth Amend.; United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Knapp v. Schweitzer, 357 U.S. 371 (1958).

The caution of the framers of the Constitution in reserving property to the States and limiting federal acquisitions is striking. Article I, Section 8 gives Congress power over a federal district for the seat of government and over all places purchased for forts, dock yards, magazines, arsenals, and other buildings, but requires that all such property be obtained only with the consent of the legislatures of the States in question. Article IV, Section 3 provides that no State shall be formed by Congress within the jurisdiction of any other State or States without the consent of the States involved. The second clause of the article also states that nothing in the Constitution "shall be so construed as to Prejudice any Claims of the United States, or of any particular State" to any property or territory, a clear attempt to negate the possibility of any implied transfer.

Thus, the very capital of the nation and the locations of its military facilities were to be lands possessed by the States and transferred only with their consents. Grants of land were, in fact, made by individual States during our early history in order to foster national interests. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221-23 (1845). Obviously the framers did not conceive that it was "necessary" to the exercise of granted federal powers that the federal government possess by implied transfer any property then belonging to the States. More important, the framers assumed that the States would continue after the Constitution to possess the public properties which had previously been theirs.

The decisions of this Court were, throughout the nineteenth century, consistent with the view that the States retained ownership of, and regulatory authority over, their lands and resources, whether or not the lands were submerged. In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), submerged lands exploited for oyster fisheries were held to have been inherited by the State involved. In the *Pollard*

case, the Court confirmed the rights of the States, rather than the federal government, to ownership of submerged lands lying below navigable waters. In *Manchester v. Massachusetts*, 139 U.S. 240, 264 (1891), the Court sustained the right of Massachusetts to regulate fishing in connection with its "territorial jurisdiction . . . over the sea adjacent to its coast . . ."

Throughout this country's history, at least down to the *California* decision in 1945, the evidence shows that it has invariably been understood and assumed that the States were the residuary owners of property within their historical boundaries, beneath their waters, or adjacent to their coasts. This view conformed to the historical origins of State title and boundary claims, since the original colonial charters conveyed rights in the broadest possible terms; for example, the New England charter of 1620, discussed below at pp. 69-71, conveyed gold, silver and other "mine and Minerals" both within the designated "Tract of Land" and also "within said Islands and Seas adjoining." Maps during the colonial period confirmed the maritime territory granted to the governments which ultimately became our States.

It cannot reasonably be questioned that at the time of *California* it was widely and emphatically believed that the States owned the submerged coastal lands. This Court itself conceded in the *California* decision that its earlier cases indicated that "the Court then believed that states not only owned tidelands and soils under all navigable waters within their territorial jurisdiction, whether inland or not." 332 U.S. at 36. The basic rule that the States owned land under navigable waters was framed, understood and applied without any suggestion that a distinction was to be drawn between inland waters and the sea, and such a distinction would have been without any legal or historical foundation. See pp. 104-12, *infra*.

It should be emphasized that, as the legislative history shows, Congress regarded itself as restoring the status quo ante when in 1953 it passed the Submerged Lands Act and reconfirmed the States' ownership within the three-mile/three-league belt. For example, in one of the pertinent legislative reports (H.R. Rep. No. 1778, 80th Cong., 2d Sess. 1-2 (1948), the legislation that evolved into the Submerged Lands Act was explained as follows:

> "[T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries. . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law."

Another report referred not only to Supreme Court decisions but to the understanding of the legal profession, the authors of leading treatises, and the belief of the lower federal court and State-supreme-court jurists "as reflected in more than 200 opinions." S. Rep. No. 1592, 80th Cong., 2d Sess. 17-18 (1948).

The long-standing exercise of State regulatory powers over the adjacent sea and its resources reinforces the presumption in favor of the States' claims in this litigation. Such regulation, extending back to colonial times, involved

extensive regulation of fishing, including sedentary fisheries in the marginal sea, the seabed resource most amenable to exploitation in the period before the advanced technology of the industrial revolution. Indeed, in *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906), this Court made reference to "the sway of the riparian States" over "the maritime belts" which allows the States to "reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber or other products of the sea."[20]

State regulation has not only subsisted for many years but has been recognized and endorsed by this Court. The cases include older ones, of course, such as *Louisiana v. Mississippi, supra*, and *Manchester v. Massachusetts, supra;* but they also include comparatively recent ones such as *Skiriotes v. Florida*, 313 U.S. 69 (1941), affirming Florida's right to regulate sponge fishing in the Gulf, and *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), sustaining Florida legislation concerning off-shore oil pollution.

State activity in the marginal sea was not limited to economic regulation. The States leased sedentary fisheries in the marginal sea (S.B. 379-80); they enacted statutes affecting title to the seabed; and they repeatedly executed deeds of portions of the seabed to the federal government, grants which the federal government accepted after receiving formal opinions from federal and State counsel confirming the State's title (S.B. 380). Extensive improvements, such as wharves and other fixed facilities, were of course regularly made by the States or under their auspices on the assumption that the States had title to the seabed (*ibid.*).

---

[20] The evidence of State regulation of fishing and other marginal-sea activity is supported by evidence so extensive that we assume it will not be challenged by the plaintiff.

Whereas the interests of the United States in the continental shelf are discrete ones involving specific, defined federal powers, the regulatory interests of the States are broad ranging and comprehensive; they include any matter that might touch upon the ordinary and historic police powers of the State. Congress endorsed this view in the Outer Continental Shelf Lands Act when it adopted the civil and criminal laws of each adjacent state, so long as not inconsistent with any federal statute or regulation, to govern the submerged lands of the outer continental shelf lying beyond the three-mile/three-league line. See Section 4(a)(2), 43 U.S.C. § 1333 (2)(2). See also *United States v. Louisiana*, 339 U.S. 699, 740 (1950).

Equally important, the coastal States' interests are intimately linked to resource development and its economic burdens and benefits in a way that the interests of the federal government can never be. For example, when an extensive offshore drilling for petroleum or natural gas occurs, it is the adjacent coastal State that bears the economic burdens of population shifts into the affected coastal regions and the enormous costs of increased policy, roadbuilding, schools and other social improvements. *Cf.* Council on Environmental Quality, *OCS Oil and Gas—An Environmental Assessment* (April 1974), pp. 7-31. It is, of course, State revenues that must be raised to pay for such activities and projects.

Similarly, the environmental impact of off-shore resource development is a matter of critical importance to the adjacent States and their economies. Oil spills, for instance, have their immediate economic impact on recreation, fishing, tourism, and related industries that may be important or vital to the affected State. See generally *Askew v. American Waterways Operators*, *su-*

pra, 411 U.S. at 333-34.[21] The same economic burden will be felt by the State whether its beaches or fisheries are imperiled by an oil well accident occurring two miles from shore or ten miles. It is, correspondingly, the State to which the direct revenues from off-shore production are essential both to provide the infrastructure that makes such development possible and to compensate for the inevitable losses that development must cause to the other economic activities on which the State's citizens depend.

II.

UNDER ENGLISH AND INTERNATIONAL LAW AND PRACTICE PRIOR TO 1776, THE MARGINAL SEAS WERE SUBJECT TO THE SOVEREIGNTY OF THE ENGLISH CROWN, AND THE RESOURCES OF THE SEAS AND SEABED BELONGED TO THE CROWN IN PROPERTY.

A. ENGLISH LAW AND PRACTICE PRIOR TO THE 17TH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE RESOURCES THEREOF.

The Master found that prior to 1603 the only crown right recognized by English law in the adjacent seas was the right

---

[21] In *Askew*, the Court quoted one expert as follows:

> "Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shorefront property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors . . . . It is estimated, for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards in harbors, ports and marinas."

to protect navigation against piracy, and that English law did not recognize either territorial sovereignty or rights of ownership in those seas (Report, pp. 27-29, 75 §§ 1, 2, 6). The record is to the contrary.

1. The Record Massively Supports the States' Position.

The evidence is conclusive that long prior to 1603 the four seas surrounding England[22] were consistently regarded as part of the realm of England, under the full territorial sovereignty and jurisdiction of the crown (S.B. 8-18). One of plaintiff's own witnesses admitted that this was the necessary meaning of a 14th-century statute referring to "the sea or elsewhere within the realm" (S.B. 11; App. 545). The same conclusion follows from another statute which, as properly translated, excluded the admiralty jurisdiction from "anything done within the realm, except things done upon the sea" (S.B. 14-18). Plentiful additional evidence requires the same conclusion. English maritime sovereignty during this early period is evidenced both by "a great body of state practice" and "some considerable comment on it by observers" (App. 698; see also App. 650-55, 658-59).

It followed from English maritime sovereignty that England had jurisdiction, legislative and administrative as well as judicial, to regulate navigation through and conduct in the English seas, both by nationals and by foreigners (S.B. 8-9, 25-31, 39). The best authorities recognize that this jurisdiction was far from limited to protection from pirates, as the Master concluded; rather the English rights of sovereignty and dominion in the sea were regarded as entailing the duty of protection as a corollary (S.B. 9-10). The admiralty jurisdiction was squarely founded on the "sovereign lordship of the Kings of England" over the "sea

[22] The entire North Sea to the east, the entire English Channel and Bay of Biscay to the south, and portions of the ocean to the north and west generally defined as extending 100 miles from the coast. See, *e.g.*, App. 824-27; pp. 47-49, 56-57, *infra*.

of England" and was exclusive within those waters (S.B. 25); the sea was "a district of the Kingdom" (S.B. 27).[23] As a recognition of English sovereignty in the English seas, foreign ships were required when in those seas to strike their sails to English ships (the "flag salute"), and the failure to do so was punished as a criminal offense (S.B. 8, 13, 30).

The English maritime jurisdiction, both asserted in law and habitually exercised in fact, encompassed not only the punishment of piracy but also the making and enforcement of substantive law of every type and the control and disposition of property rights, including the grant of exclusive fisheries, both surface and sedentary; the exclusion, taxing or licensing of foreign navigation and fishing, and regulation of the time, manner and extent of fishing for conservation and other purposes (S.B. 18-25, 28-31). Plaintiff's witness on mediaeval law conceded that the crown asserted and exercised the right to grant exclusive fisheries in the English seas (App. 545).[24] The crown's rights to royal fish, flotsam, jetsam and lagan were squarely based on maritime territorial sovereignty and were deemed coextensive with the seas which were part of the realm (S.B. 10-12).

---

[23] The admiralty jurisdiction included both the definition and the punishment of criminal offenses on the English seas, by foreigners as well as by English subjects, with no distinction between piracy and other crimes (S.B. 25-31).

[24] While the Master relies heavily on the fact that at some periods the English crown permitted fishing by certain classes of foreigners without charge in the English seas, such permission is in no way inconsistent with the assertion of sovereign rights which included the prohibition or taxing of such fishing if and when the crown so chose (S.B. 23-24). England asserted and frequently exercised the right to exclude or to tax foreign fishermen when it wished (S.B. 23-25), as plaintiff's witness on mediaeval law conceded (App. 544).

The record demonstrates, also, that English law prior to 1603 fully recognized crown ownership of the seabed under the marginal seas and the resources thereof (S.B. 31-33). This is evidenced by, among other things, royal grants of title to sedentary fisheries and of title to surface fisheries which depended on the exclusive right to use the seabed for weirs or other devices (*ibid.*). In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the King," and many early decided cases are founded on that ownership (S.B. 32). English law, contrary to Roman law, held that a new island rising in the English sea belongs to the crown, and that doctrine was based on the principle that the crown had owned the land while still covered with water (S.B. 13; Tr. 325).

When during the reign of Elizabeth I Thomas Diggs formulated a systematic theory of crown ownership of the foreshore, he took crown ownership of the sea and seabed as well established and noncontroversial (S.B. 36-37). The record is clear, and plaintiff's witness conceded, that Queen Elizabeth's government fully subscribed to and implemented Diggs' doctrines (S.B. 38; App. 28-29). Other Elizabethan writers of great eminence and influence, including Gentili and Dee, described a fully developed law of territorial waters, 100 miles wide at a minimum, in which full maritime sovereignty and dominion were exercised (App. 804-05, 812-13; S.B. 35-36).

The Master relied heavily (Report, pp. 26-27) on a statement by Queen Elizabeth in 1580 that the ocean is free to all. Elizabeth was rebutting the Spanish claim (S.B. 267) that all the oceans of the world had been divided between Spain and Portugal,[25] and that even innocent passage of foreign ships through those oceans was solely at Spain's

[25] The statement was made in response to a complaint by the Spanish ambassador against Sir Francis Drake's navigating through the Pacific Ocean. 1 Oppenheim, International Law 584 (8th ed. Lauterpacht 1955).

sufferance. She was plainly referring to open or high seas far from any coast, not to the more limited areas, such as the English seas as traditionally defined, which overlie the continental shelf. Many actions by Elizabeth and her governments demonstrate adherence to and enforcement of the traditional English doctrine of maritime sovereignty and dominion, including the flag salute and the requirement that anyone wishing to navigate through the English seas first secure her permission (S.B. 8, 34; see generally S.B. 33-45).

Indeed it is during Elizabeth's reign that we find the first evidence that the marginal seas in North America were, like the English seas, to be regarded as subject to English sovereignty, dominion and exclusive fishing. In accordance with the law of monopolies which was developed during Elizabeth's reign (S.B. 39-43),[26] the earliest letters patent for American colonization conveyed monopolies of fishing and other maritime "royalties" in the seas of the areas to be discovered and settled (S.B. 41-43). These patents were promptly implemented, foreign fishermen being excluded from the rich American fisheries as soon as the English were in possession of the adjacent land (S.B. 43-45; App. 832-33). Thus the full development in the 17th century of English maritime sovereignty and dominion was no new and ephemeral creation resulting from the Stuart succession and dying with it. Indeed, the extension of that English law and practice to the marginal seas of the new English discoveries and settlements in North America was both implicit and explicit from the very beginning of that enterprise, before the first Stuart came to the throne.

---

[26] The rule, formulated by Sir Edward Coke when Attorney General, was that a royally created monopoly was valid if it involved a new discovery, venture or economic opportunity, in the seas or on land, but not if it attempted to exclude Englishmen from particular economic activities in places where they had previously engaged in them. S.B. 39-43.

2. The Master's Erroneous Methodology Undermines His Determination.

A principal reason for the Master's error on this as well as other points involves an astonishingly unsound approach to historical methodology which pervades his discussion of English law and practice both before and after 1603. The Master paid an extraordinary deference to one of the many secondary sources which have figured largely in this litigation: T.W. Fulton's book *The Sovereignty of the Sea* (1911). The Master goes so far as to say he has "tested the evidence and exhibits" (including innumerable primary sources) by whether they coincide with Fulton's views (Report, p. 25). Obviously, the opposite approach is the correct one; secondary sources must be tested by the primary evidence.

Fulton is a significant source, and in many respects supports the States' case here. The controversial aspects of the Master's reliance on Fulton relate mainly to two points: the claim that English law prior to 1603 failed to recognize maritime sovereignty and dominion, and the claim that the admitted 17-century legal recognition thereof vanished after 1688.

On these two points, Fulton is sharply at variance both with the evidence introduced herein, including the primary authorities, and with the weight of scholarship in all periods. Fulton's was a frankly revisionist book, designed to refute what all earlier writers had believed about the traditional, and continuing, English law and practice (App. 104-05). It was, moreover, written at the height of popularity of freedom-of-the-seas doctrine with respect to navigation, a doctrine of which Fulton was a zealous advocate. Any random excursion through Fulton's pages will make it apparent to an impartial mind that Fulton's tone and argument are distinctly partisan. Fulton was not a lawyer—his book refers to him as "lecturer on the scientific

study of fishery problems, University of Aberdeen"—and had no comprehension of the legal significance of many of the historical events which he treats. His study is not a law book, but a political history with an axe to grind.

Moreover, later and better-qualified writers have not accepted Fulton's controversial theories. Elder, Potter, Fenn, O'Connell and many others have found the traditional view of English law respecting maritime sovereignty and dominion far more historically accurate than Fulton's attempted revision. (See S.B. 8-10, 71, 124, 265-66; App. 105, 658-59, 695-701.) Fenn, for example, is immeasurably more sophisticated and knowledgeable in analyzing mediaeval law and practice, and arrives at conclusions sharply opposed to Fulton's (S.B. 272; App. 791-818). Similarly, O'Connell has made a far more careful analysis of post-1688 law and practice, and again vigorously disputes Fulton's views (pp. 56, 60, *infra*). Plainly it is unsound scholarship to take one rather dated secondary source as gospel on points where he is refuted by later and better authority, not to speak of the massive primary-source documentation which has been introduced herein.

Even aside from Fulton, the Master relies almost entirely on other secondary sources to establish English and international law of the 17th and 18th centuries, notwithstanding the fact that the record makes the relevant primary sources fully available. Where secondary sources are refuted by the primary evidence, reliance on the former is plain error. The Master's report is replete with unwillingness to accept the obvious proposition that the best evidence for the law of a particular historical period is what the courts, other law-giving authorities and commentators of that period said it was.

3. The Master's Misconception of the Issues Led Him To Ignore Much of the Relevant Evidence.

Another error infecting the Master's discussion of pre-17th century practice—and pervading the Master's historical analysis throughout the entire Report—is that he discounted as irrelevant all the evidence in the record demonstrating the assertion and exercise by the English, colonial and State governments of sovereignty and dominion in the marginal seas and seabed close to the shore, on the ground that the areas in question were or may have been within three miles of the coast. The Master's theory was that the three-mile belt is not at issue in this litigation, since because of the "gift" by Congress in the Submerged Lands Act it is conceded that the States own that belt (Report, pp. 24-25, 56, 80 § 25). The Master's approach is demonstrably unsound in several critical respects.

California focused upon a lack of evidence in the record in that case to establish a uniform three-mile belt in colonial times; see pp. 13-14, *supra*. The Common Counsel States in this case do not assert that any such uniform belt arose prior to the 18th century; they show instead that, when it did arise, it represented a curtailment of a broader right of sovereignty and dominion previously recognized in English and international law; see pp. 58-60, 113-16, *infra*. Even more important, a fundamental question presented in this case is the soundness of *California's* historical holding so far as it may be read to negate any offshore colonial or State ownership claims in the 17th and 18th centuries. Any evidence logically pertinent to this inquiry must be weighed on its merits and not discounted in advance.

Given the state of technology prior to recent times, it is natural that much—though by no means all—of the historical evidence showing the assertion and exercise of maritime sovereignty and dominion relates to areas fairly

close to shore, where exploitation was feasible. Prior to, at the earliest, the very end of the 18th century, neither English nor international law made any legal distinction between a three-mile belt and the adjacent seas beyond three miles; no one had ever heard of a three-mile limit. Thus evidence regarding maritime sovereignty and dominion prior to the formation of the union, to whatever distance offshore, is highly relevant in refuting any assumption imputed to *California* that prior to acceptance of the three-mile limit maritime sovereignty and dominion stopped at the low-water mark.[27]

No balanced and impartial scrutiny of the evidence can escape the conclusion that, long prior to 1603, English law and practice consistently recognized extensive rights of sovereignty and dominion in the marginal seas which included the right here at issue: the exclusive right to exploit seabed resources. The state of the law both with respect to areas where seabed exploitation was then feasible and on analogous subjects, such as surface fisheries, islands rising in the sea and derelict lands, made it wholly clear that exploitable resources anywhere on the bed of the English seas would have been claimed by the crown instantly upon their discovery and that the claim would have been legally sustained.

B. ENGLISH LAW AND PRACTICE DURING THE 17TH CENTURY, THE PERIOD OF THE COLONIAL CHARTERS, FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS AND SEABED; AND NOTHING IN INTERNATIONAL LAW WAS TO THE CONTRARY.

During the reign of James I (1603-25) and thereafter,

[27] Likewise, post-1787 evidence of State assertion and exercise of sovereignty and dominion within the three-mile belt is relevant in refuting *California's* alleged holding that since the formation of the union whatever rights of sovereignty and dominion have existed in the marginal seas belong to the federal government.

English law and practice unequivocally affirmed the rights of sovereignty and property of the crown in the adjoining seas. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended for 100 miles. Within the English seas, the right to the fisheries was exclusive, and the crown had and constantly exercised full rights of regulation, control and licensing of the fisheries. The admiralty jurisdiction was territorial in the English seas, and the flag salute was required for foreign ships in those seas. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof.

The overwhelming body of evidence supporting these conclusions is summarized at S.B. 47-124. The facts were largely conceded by plaintiff's witnesses and by the Master. To the extent the Master disagreed, he is refuted by the record.

1. The English Seas Were Within the Realm of England.

The Master denies (Report, p. 35) that English law deemed the English seas to be part of the realm of England

or under the territorial sovereignty of the English crown (though he concedes that they were under the crown's "dominion," *ibid.*). For that proposition the Master relies on a single unofficial authority—Sir Henry Finch in 1613—whose brief discussion of the matter is quoted in full at S.B. 69. Even Finch does not support the Master's conclusion.

Finch identified the term "realm" with the bodies of counties, which end at low-water mark. But he plainly did not believe that the territorial sovereignty of the English crown was limited to the "realm" in that narrow sense, since in the same sentence he declares that Scotland, Wales and Ireland are not within the realm either. Finch's sole concern in the passage in question was the territorial extent of the jurisdiction of the English common-law courts, not a definition of those areas over which the crown held territorial sovereignty.

Finch, moreover, is the *only* 17th-century authority who is even faintly ambiguous on this score. The massive evidence summarized at S.B. 48-73, and excerpted at App. 31-40, 46-48, 91, 93, 647-50, 655-56, 667-68, 674-77, 697, 712-15, 721, 726, 731, 739-40, 777-83, 854, 897-98, demonstrates the overwhelming consensus throughout the 17th century that the crown possessed territorial sovereignty over the English seas as full and complete as over the land of England itself. The evidence includes judicial decisions, notably the famous *Ship Money Case* in 1637 (S.B. 49-54). Acts of Parliament (S.B. 55-56), several official opinions of the law officers of the crown (S.B. 56-58), and other official pronouncements and governmental acts having legal force (S.B. 58-60) were unambiguously to the same effect. This English maritime sovereignty was recognized on a number of occasions by foreign nations, by treaty and otherwise (S.B. 72-73). The same principle was unequivocally expounded by every 17th-century English legal commentator we have found who discussed the issue except Finch—at

least 13 of them (S.B. 61-69), including the three most influential, Coke, Selden and Hale.[28]

2. The 17th-Century English Admiralty Jurisdiction in the English Seas Was a Territorial Jurisdiction.

The Master disputes (pp. 31-33, 75 § 5) the unanimous opinion of every 17th-century English legal authority that the admiralty jurisdiction in the English seas was a territorial, not a personal, jurisdiction. We rely on the territorial nature of the jurisdiction because it confirms the crown's territorial sovereignty in the seas and because the jurisdiction encompassed the exclusion of foreigners from unlicensed exploitation of maritime resources.

The evidence showing the unanimous agreement of 17th-century courts, officials and legal authorities that the admiralty jurisdiction in the English seas was founded on the crown's sovereignty in those seas is summarized at S.B. 92-98 and, with respect to the insistence on the flag salute as an attribute of sovereignty, at S.B. 117-20. Among the clearest evidence are the charges of the famous admiralty judge Jenkins to admiralty juries, App. 894-903. Jenkins squarely based the admiralty jurisdiction upon, and deemed it coextensive with, the "sovereignty of our kings in the British ocean" (App. 895). No distinction is made between English subjects and foreigners with respect to the activities in the English seas which are to be investigated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag

[28] Merely as one example, Coke declared that "if a man be upon the sea of England, he is within the kingdom or realm of England and within the legeance of the King of England, as of his crown of England" (App. 655; S.B. 65). Every modern commentator, including Fulton, is to the same effect (S.B. 70-72; App. 810).

salute (App. 896). A clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the non-territorial jurisdiction over piracy anywhere in the world, which is non-exclusive (App. 897-99; see also App. 675). The admiralty enforced the various statutes and ordinances regulating exploitation of maritime resources, both surface and seabed (App. 903).

Further, conclusive evidence at App. 721-38 shows the indictment, trial and conviction of a number of foreigners for crimes other than piracy (*i.e.*, failure to give the flag salute) committed in the English seas. The indictments flatly recited that the British seas are "within the sovereignty and of the dominion of the kings of England . . . as a parcel of the Kingdom of England" (App. 721, 731). Since these indictments were found legally sufficient and resulted in convictions, they are unimpeachable authority.

The Master appears to contend that the admiralty jurisdiction, even if territorial, was somewhat more limited than English jurisdiction on land, in that it did not include such crimes as the murder of one foreigner by another on board a foreign vessel (Report, pp. 31-32). But for the purpose of this litigation that question is academic: no one familiar with the evidence can doubt, and the Master nowhere denies, that the jurisdiction would have been instantly applied to a foreigner seeking to extract mineral from the seabed of the English seas. That is wholly sufficient to sustain the States' claim here. The States need not show historical precedents for sovereignty or dominion over the sea going beyond the rights at issue here.[29]

[29] As to the irrelevant question of jurisdiction over internal affairs of a foreign ship, with no English persons or interests involved, it is hardly surprising that such incidents are not found; the English authorities would probably not even know of such a crime. Moreover, during this period the right of innocent passage of foreign ships was generally recognized as a qualification on full maritime territorial sovereignty

The Master relied on Justice Cockburn's 19th-century opinion in *Queen v. Keyn* for the proposition that 17th-century English admiralty courts had no jurisdiction over foreigners. While Justice Cockburn's treatment of the admiralty cases he did treat was highly questionable (App. 53-58), the conclusive refutation to Cockburn is found in the cases at App. 721-38, of which he was apparently unaware. See also App. 56-57. In any event, there cannot be the slightest doubt that every 17th-century authority, judicial, official and unofficial, regarded the admiralty jurisdiction as territorial and as extending to foreigners at least whenever foreign activity in the English seas impinged on English interests, as any attempt to exploit seabed resources would obviously have done.[30]

Finally, the Master claims that in the treaty of 1674 it was agreed that the Dutch would accord the flag salute "merely as a ceremony of honor and a testimony of respect

(S.B. 120-21; App. 815-16, 850), just as it is today. That right entails immunity of a foreign ship from the jurisdiction of the territorial state so long as the acts in question have no effect outside the ship; the ship is regarded as part of the territory of the sovereign of its flag, and carries its own territoriality with it—again so long as no effects outside the ship are produced. *E.g.*, 4 Whiteman (U.S. Dept. of State), Digest of International Law, 11, 387, 400-01 (1965); 6 *id.* at 93 (1968); 9 *id.* at 67-71 (1968). No one questions that, for these reasons, United States courts today have no jurisdiction over a murder on board a foreign ship even in territorial waters, let alone in the waters overlying the continental shelf. Yet no one contends that that limitation means that the three-mile belt is not territorial or that continental-shelf resources are not subject to the exclusive right of national exploitation.

[30] While the Master may believe (Report, p. 32 n.) that the 17th-century statement to this effect by Lord Hale (Chief Justice of England and the leading authority on maritime law) was not supported by the evidence from even earlier centuries which Hale cited, that surely is not the point: the Master is not expounding 17th-century law, but quarreling with it. Hale, Selden, and others, plus the primary legal evidence mentioned above, simply leave no doubt as to what that law was.

to the English crown" (Report, p. 23). The treaty acknowledges "the right" of the English king "to have honour paid to his flag . . . in the same manner, and with the like testimony of respect, as has usually been paid" in the seas whose boundaries were specified, and declares that the Dutch were "justly acknowledging" that right (13 Parry, *Consolidated Treaty Series* 133, 134-35). It is quite true that the Dutch never admitted English territorial sovereignty in the English seas or that the flag salute was a corollary of it; the question here is what the law of England was, and there can be no question that English law regarded it as such a corollary (S.B. 117-20; App. 828, 851-52).

3. The Crown Possessed the Legal Right To Exclude or To License Foreign Fishermen in the English Seas and the Right To Create Monopolies of Newly Discovered Fisheries; and All Fisheries in English Waters Were Subject to Regulation.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. *Prima facie*, the crown owned the sea fisheries as one of its principal *regalia* or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

Foreigners had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure, and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of

fishing. This body of English regulatory law of sea fishing was policed by the the navy and enforced judicially in the admiralty courts.

At S.B. 75-92 we discuss a wealth of court cases, acts of Parliament, legal opinions, royal proclamations, other official pronouncements and acts of state, legal treatises, modern commentators and treaties, spanning the entire century from beginning to end, which both declared and implemented crown ownership of the fisheries throughout the English seas.[31] While the Master habitually refers to the English position as "claims," it is certain beyond question, and indeed the Master never denies, that the "claims" were fully incorporated into the positive law of England. Plaintiff's witness admitted this (App. 546-51).

The legal foundation of the crown ownership of the fisheries was uniformly declared and held to be the territorial sovereignty of the crown over the waters in which the fisheries were located. No distinction was made between surface fisheries and sedentary fisheries or mineral resources; the same sovereignty that embraced the one would equally embrace the other. This view is confirmed by the actual law and practice as to seabed and seabed-resource ownership.

4. The Crown Owned the Seabed and Subsoil of the English Seas and the Resources Thereof.

As previously seen (p. 30, *supra*), crown ownership of the seabed of the English seas was declared and recognized

---

[31] For example, in the Case of the Royal Fishery of the Banne in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The *ratio decidendi* was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also (S.B. 98-100; Exhibit 157). The crown right to fisheries the court called a "royalty." *Id.* at 41.

during the mediaeval period and was taken by Diggs in Elizabeth's reign as the basic premise on which he erected his new doctrine of crown ownership of the foreshore. In the 17th century the doctrine remained unchanged and was frequently reaffirmed from beginning to end of the century. In the *Case of the Royal Fishery of the Banne* in 1610, p 45, *supra*, n. 31, England's highest court held that the "sea is . . . under the dominion of the king," and was plainly referring to the bed as well as the surface ("therefore the king shall have the land which is gained out of the sea") (S.B. 99). Later cases explicitly applied the doctrine to the bed of navigable waters (S.B. 100-05). Plaintiff's witness Professor Thorne conceded that the crown's property rights in the English seas extended both to sedentary fisheries and to subsoil mineral resources (App. 551-54).

Theory was confirmed by practice. Throughout the century the crown exercised ownership of lands reclaimed from the sea, exclusive oyster fisheries in the sea, and islands rising in the sea (S.B. 106-07; App. 92-98). Legal treatises, both 17th century and modern, uniformly recognize crown ownership of the seabed and its resources (S.B. 107-17). Among the earlier 17th-century writers, Callis in 1622 affirmed the crown ownership in detail and at length (S.B. 107-09; App. 777-83).

The Master, after discussing the writings of Selden and Hale which also unequivocally affirmed crown ownership of the seabed, correctly concluded that "by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland" (Report, p. 35). Later, when he dealt with the colonial charters, the Master assumed that it was *only* the writings of Selden and Hale which first established seabed ownership, as a new doctrine, and therefore that the

colonial charters issued before the publication of Selden's *Mare Clausum* in 1635 conveyed no seabed rights. For the reasons given above and at pp. 63-66, *infra*, this assumption is wholly without merit.

5. Under English and International Law in the Seventeenth Century, Maritime Sovereignty and Dominion Were Not Limited to Areas Effectively Occupied; a Uniform Belt of at Least 100 Miles Was Recognized, Subject to Adjustment in Cases of Special Historical Circumstances.

The Master held that in 17th-century law, both English and international, maritime sovereignty and dominion were limited to areas of sea physically and continuously occupied by a navy (Report, pp. 35-38), and hence that the English seas had no permanent boundaries, expanding or contracting as the navy was more or less powerful (pp. 39-40). For international law the Master relies on secondary sources alone; for English law, he purports to rely on Hale and Selden.

Neither the Master nor plaintiff has cited any English authority which held that the English seas subject to English jurisdiction expanded and contracted depending on England's relative naval power; and we have encountered none. Every English authority cited in the record gave the same definition of the English seas: the entire English Channel and Bay of Biscay as far as Cape Finisterre, the North Sea up to the latitude of Cape Van Staten in Norway, and to the north and west of England to a distance which was sometimes unspecified but was defined by every writer who addressed the subject as 100 miles (S.B. 35, 47, 58, 61, 67, 68, 126, 128, 131, 212-213, 276-278). This definition was regarded as fixed and constant, and remained so through the 18th century and into the 19th century (pp. 55-58, *infra;* S.B. 126-29, 465-68).

The passage from Hale quoted by the Master (Report, pp. 35-36) does not say that physical occupation was necessary for ownership; it speaks in terms of the *capacity* for occupation, not the physical fact of occupation. The quoted passage from Selden (Report, p. 36) declares that maritime sovereignty does not arise "*altogether*" from ownership of the adjacent land, but *also* is based on "use or enjoyment of the sea," such as having a navy, prescribing rules of navigation, engaging in maritime commerce and in "admitting or excluding others at pleasure." [32]

Selden, moreover, made it plain with specific reference to English maritime sovereignty in North American waters, in a passage quoted in full at S.B. 172-174, that physical occupation of the American marginal seas was not at all necessary to affirm the English title to them. In that passage Selden based the English right to the North American marginal seas on the conventional grounds of the English discovery and settlement of the adjacent coasts, and on the performance of symbolic acts of sovereignty on

---

[32] From this the Master deduces (p. 38) that even in the Stuart period England did not meet Selden's test, since it did not attempt to exclude or to tax peaceful foreign vessels traveling through the English seas. Plainly, the Master is misunderstanding Selden, since Selden unquestionably believed that England possessed full sovereignty in the English seas. Selden's view, like that of most other writers of the period (S.B. 120-21), was that the right of innocent passage should as a general matter be permitted without question. Mare Clausum, pp. 123-26. But Selden makes it clear that innocent passage was not inconsistent with maritime sovereignty and dominion:

"[T]he Offices of Humanitie require, that entertainment bee given to Strangers, and that inoffensive passage bee not denied them. . . . But what is this to the Dominion of that thing, through which both Merchants and Strangers are to pass? Such a freedom of Passage would no more derogate from it . . . than the allowing of an open waie for the driving of Cattel, or Cart, or passing through upon a journie, or any other Service of that nature, through another man's Field, could prejudice the Ownership thereof." *Id.* at 123-24.

those coasts. He expressly states that seas "that were never taken into possession" might become subject to a valid title on the basis of such settlement of the adjacent coast plus a claim to the seas "in hope of using and enjoying." Other English authorities likewise denied that occupation was necessary (S.B. 61; App. 663-64, 673-74).

Every English legal writer before and during the 17th and 18th centuries who stated a limit for maritime sovereignty in the absence of special factors stated the same limit: 100 miles (S.B. references at p. 47, *supra*). The 100-mile limit was asserted during the period of the earliest colonial charters both by the Prime Minister of England, speaking officially (S.B. 58), and by the leading international law authority residing in England at the time (S.B. 35, 171; App. 804-06). As we shall see (pp. 81-84, *infra*), the 100-mile limit was incorporated in the colonial charters as well.

The relevant international law of the 17th and surrounding centuries is discussed in detail at S.B. 261-83. The nature of international law is such that a national claim or practice violates it only if there is a generally recognized and accepted consensus of international doctrine and practice forbidding that conduct[33]—a consensus which, as to the 17th century, must be deduced from, in the first instance, state practice and, as a "subsidiary means" (App. 110), the writings of learned commentators *of that period*.

No one contends or could contend that in the 17th or

---

[33] S.B. 263; App. 108-11; Case of the S.S. Lotus, [1927] P.C.I.J., ser. A, no. 10, at 4, 19. Even apart from the state of international law in that period, it must be remembered that national courts do not use international law as a device for rebutting the claims of their own sovereigns (S.B. 261-62, 404-05), and that it is inconceivable that an English court in the period under discussion would have regarded the maritime sovereignty which existed in English law as impeachable on international-law grounds.

preceding centuries a consensus existed either in state practice or in doctrine which outlawed England's claims to maritime sovereignty and dominion. Similar claims were made and exercised by the overwhelming majority of nations bordering on the sea; and international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it (*e.g.*, App. 803-18). There was no consensus by the 17th century limiting the extent to which such maritime rights could be claimed and exercised, except that the claim of Spain and Portugal to all the oceans of the world had been rejected. Among international-law writers who proposed some limit to maritime claims, the overwhelming majority proposed either 100 miles or 30 leagues, which is virtually identical (S.B. 271-78; App. 804-06). Sixty miles was the narrowest limit proposed by anyone (S.B. 277); it is undisputed that by the end of the 17th century no one had proposed any narrow-limit rule such as cannon shot or the three-mile limit.

For his contention that occupation was necessary under 17th-century international law the Master relies (Report, pp. 36-38) on Waldock, Oppenheim and Westlake. But none of these writers purported, in the passages relied on, to speak of any period earlier than the 20th century. For example, Waldock expressly states that the purpose of the part of his article on which the Master relies was "to set out the legal position broadly as it obtained at the outbreak of the Second World War," "The Legal Basis of Claims to the Continental Shelf," 36 *Grotius Society* 115 (1951); and there is not a word in the entire article which deals with pre-20th century law or practice.[34]

[34] Likewise the passage from Oppenheim relied on by the Master deals solely with 20th-century law. Elsewhere, Oppenheim recognizes that the earlier law contained no requirement of effective occupation. 1 Oppenheim, International Law 558-59 (8th ed. Lauterpacht 1955).

It has been conclusively established in the authoritative Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (1938), cited with approval by Oppenheim himself,[35] that "effective occupation" was not necessary for the establishment of sovereignty in the 17th century:

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state." App. 822; S.B. 162-64.

This passage is a summary of the entire book, which exhaustively analyzes the evidence and the law. Plaintiff's witness Professor Thorne conceded that "a claim made in the name of the King," without effective occupation, was sufficient to establish title to newly discovered territory in the 17th century (App. 546). This Court has repeatedly recognized that during the colonial period discovery, without "effective occupation," was adequate to establish English sovereignty.[36]

---

[35] *Loc. cit.* p. 50, *supra*, n. 34.

[36] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Massachusetts v. New York, 271 U.S. 65, 85 (1926). *Accord*, 1 Story, Commentaries on the Constitution §§ 2-38, pp. 6-18 (5th ed. 1905).

The criteria for sovereignty in the sea and seabed have always been substantially *less* stringent than as to land areas. In the 17th century sovereignty over the adjacent land territory, plus claims to maritime sovereignty and a minimum of maritime activity in portions of the marginal sea, were deemed wholly sufficient to establish title to the entire marginal sea out to at least 100 miles. Nor did subsequent law impose any requirement of prior effective occupation as to the exclusive right to exploit seabed resources; see pp. 120-29, *infra*. The English title to the North American seas and fisheries was habitually justified, not only by writers but by the British government, on the ground of English first discovery and performance of symbolic acts of sovereignty on the adjacent land areas (S.B. 164, 172-74, 231-32). The Master's attempt to import into the law of the colonial period a requirement of effective occupation for the establishment of sovereignty is wholly unhistorical, as this Court has several times held.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that full territorial maritime sovereignty and dominion, without any "occupation" requirement, existed in the 17th century. The court referred to

> "the fundamental principles of the law of nations, *both ancient and modern*, in accordance with which, the maritime territory is an *essential appurtenance of land territory*, whence it follows that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, *Hague Court Reports* 121, 127 (1916). (Emphasis added.)

Even if there had been an "occupation" requirement, which there was not, it was fully satisfied with respect to the marginal seas of the Common Counsel States. In the 17th and 18th centuries the capability of ships, especially their capacities with respect to provisions and their lack of space for drying fish once they were caught, was such as to make it wholly impractical for a nation to challenge the maritime supremacy of another state in the latter's adjacent waters unless the challenging nation had bases close by. Thus the Dutch could mount real contests against the British claims to sovereignty and dominion in the North Sea, for the fisheries of those waters were no farther from the Dutch ports than they were from England itself. Likewise in Canada there could be and were sharp contests between England and France over the fisheries so long as the Canadian coastline and islands were divided among those two empires. But in the adjacent waters of the Common Counsel States, far from any French bases or ports and hopelessly far from those of any other European power, possession of the coast gave England and its colonists as a practical matter complete control over the marginal seas (S.B. 224, 233-34; App. 791, 830-31).[37] The only exception proves the rule: in the waters of Maine, as in Canada, the French and English bitterly fought for a monopoly of the fisheries, and the English were successful (App. 838-46).

Plaintiff and the Master contend that the relative paucity of evidence regarding conflicts in, or exclusions of foreigners from, colonial waters means that no maritime sovereignty

[37] Plaintiff expressly conceded this point: in the marginal seas of the colonies south of Canada, "for all practical purposes control of the land meant control of the fisheries." Post-Trial Brief for the United States. 143; see also Tr. 1632.

and dominion were claimed. On the contrary, the evidence shows the colonial maritime sovereignty was unchallenged. Throughout the colonial period, England and its colonies enjoyed the exclusive use of the colonies' marginal seas.

Plaintiff and the Master have referred to no evidence whatever that foreign states or their nationals even attempted any use of the marginal seas of the Common Counsel States during the colonial period. And we can be certain from the absence of evidence that south of Maine few if any such attempts were made, simply because of the sharp and bitter conflicts that arose in areas—*e.g.*, the North Sea and Canadian and Maine waters—where such challenges were physically possible (S.B. 79-86, 222-36). Plaintiff's own witnesses conceded that if the French or other foreigners had attempted to exploit our marginal seas for fishing or otherwise, such attempts would have been resisted as they were elsewhere (App. 536, 541-42, 555).

Neither law nor practice in the 17th century or later required that, to establish exclusive title to seabed resources, a coastal state "occupy" an area of the sea or seabed *before* exploitable resources were discovered. The whole history of seabed exploitation shows that, as improved technology has made exploitation of larger areas or new resources feasible, the coastal state has automatically exercised the exclusive right to control exploitation and occupation has followed. Exploitable resources on the North American continental shelf in the 17th century thus clearly would have been claimed by the sovereign of the adjacent state, and foreigners would have been excluded. This view is consistent with, and supported by, the evidence of charters and governmental practice central to the States' claim of title int his case. See pp. 63-89, *infra*.[38]

[38] Although the Common Counsel States believe that the primary sources and commentators themselves established the 17th-century law

C. ENGLISH SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS WERE NOT ABANDONED OR REPUDIATED EITHER BY ENGLISH LAW OR BY INTERNATIONAL LAW IN THE PERIOD 1688-1776.

The Master found that between 1688 and 1776—"sometime before 1776" (Report, p. 46) — the English law of the preceding century with respect to maritime sovereignty and dominion was "allowed to die out from practical affairs," surviving " 'only in the pages of historians, naval writers, and pamphleteers' " (p. 40), and that no maritime sovereignty and dominion then existed either in English or international law until wholly new, more limited rules (cannon shot; eventually the three-mile limit) arose (pp. 39-47, 75-76 §§ 4, 6-8, 10).

The Master's reliance for these propositions is *solely* on Fulton and on other 20th-century secondary sources, plus two English cases decided in 1876 and 1914 respectively. Not only did the Master ignore the primary, contemporary sources which are obviously the best evidence for 18th-century law and practice; the authorities on which he did rely do not support his conclusions as to the period under discussion. While Fulton does make the statement quoted by the Master at Report, p. 40, evidence Fulton himself

---

and practice beyond reasonable dispute, they introduced before the Master the testimony of Philip C. Jessup, former Judge of the International Court of Justice, an eminent former diplomat and State Department official, and the leading scholarly expert in this country—probably in the world—on the law of the oceans (App. 106-08). Judge Jessup's testimony, in particular, demolished the claim that occupation was necessary and affirmed that coastal states had in the 17th century, and ever since have had, the exclusive right to exploit the resources of the adjacent seabed (pp. 116-29, *infra*).

elsewhere brings forward helps, as we shall see in a moment, to demonstrate the falseness of that statement.[39]

As to the Master's other authorities, the Master has drawn conclusions from them with respect to a period about which they do not even purport to speak, as the Master's own quotations make clear. For example, Brownlie (Report, pp. 40-41) says a change in the law in favor of the cannon-shot rule had taken place by the "late 18th century"; but no authority we have encountered claims that this had occurred by 1776, no one has claimed that a cannon-shot or three-mile rule was heard of in English law before 1800, and Brownlie was speaking of surface waters, not the seabed.[40] Not only do the Master's own authorities provide no support whatever for his position; that position is false in fact.

The relevant 18th century English law and practice is analyzed at S.B. 124-39 on the basis of primary, contemporaneous sources. These show that the doctrine, as it existed prior to 1688, that the English seas is historically

---

[39] O'Connell has recently demonstrated that Fulton's statement quoted by the Master was wrong. O'Connell, "The Jurisdictional Nature of the Territorial Sea," 45 Brit. Y.B. Int'l L. 303, 316-19 (1971). Even Fulton acknowledged that the cannon-shot rule and the three-mile limit were "unknown to English law prior to 1800." Fulton, *op. cit.* at 579-80.

[40] Similarly, Potter observes merely that the claim to entire closed seas had been abandoned by the middle of the 19th century. Potter, The Freedom of the Seas 90 (1924). Elihu Root (Report, pp. 41-42) was likewise talking about a 19th-century development. The Privy Council's opinion in Attorney General for British Columbia v. Attorney General for Canada (Report, p. 42), written in 1914, merely says that the doctrine of the narrow seas is "*now* obsolete." (Emphasis added.) Similarly, Cockburn's opinion in Queen v. Keyn (Report, p. 43) says merely that as of 1876, the time of writing, the narrow-seas doctrine "is *now* exploded." (Emphasis added.) All these authorities, moreover, were dealing with claims to territorial sovereignty over the surface waters of entire seas, not with rights to the seabed resources of the continental shelf.

defined were within the realm of England and were subject to crown sovereignty and dominion, together with the historic definition of the extent of those seas, remained constant and unanimously accepted in the legal literature of the period. Fulton's passage relied on by the Master (Report, p. 40) calls these authorities "historians, naval writers, and pamphleteers". In point of fact, they included practical diplomats like Lediard (S.B. 128; App. 824-28); the most authoritative general legal writers of the period, like Blackstone, Viner and Bacon (S.B. 128-29; App. 649); judges like Comyn, Hedges and Penrice (S.B. 126-128, App. 657, 665, 693-94, 741-44); high officials in charge of the precise subject matter at issue, like Burchett (S.B. 128; App. 771-75), and the leading authorities, like Justice and the anonymous writer of 1746 (S.B. 127, 129), on the law of admiralty, which of course was the branch of law which governed English rights and jurisdiction in the seas. At least two English treaties made during the period with foreign states likewise recognized that the English seas "appertain[ed] to his majesty's dominions" (S.B. 127). The definition and exercise of the admiralty jurisdiction remained unchanged from the preceding centuries (S.B. 132-33), and the flag salute as a recognition of English maritime sovereignty was insisted upon just as before and enforced on the relatively rare occasions when it was refused (S.B. 135-36).

Nor was the British claim to regulate fishing in the English seas and to exclude unlicensed foreign fishing given up. Fulton himself recognizes that the English navy continued to enforce the exclusion of Dutch fishing, and that the British efforts, together with French depredations during the Franco-Dutch wars, were successful in destroying the Dutch fishery, replacing it by an English fishery, and thereby solving "the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts." Fulton, *op. cit.* at 534; S.B. 129-30. British legal authority throughout the century remained

wholly consistent with these British governmental actions (S.B. 130-32). Acts of Parliament regulated the manner of fishing in the English seas, and recognized the exclusive ownership of sedentary fisheries where those had been granted by the crown (S.B. 130). And the English courts continued to rely on 17th-century authorities such as Hale for the law of maritime sovereignty and dominion (S.B. 131-32).

Crown ownership of the seabed and subsoil and the resources thereof likewise continued to be fully recognized in law. The doctrine of crown ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, p. xxxii-iii. Blackstone is only the best known of the many 18th-century legal writers and court cases which reaffirmed and applied the unchanged 17th-century doctrine of crown ownership of the seabed of the English seas (S.B. 133-35; App. 648-49). In the face of all this evidence of record, the Master's exclusive reliance on a few non-contemporaneous secondary sources which do not even support his inferences is incomprehensible.

When the 19th- and 20th-century writers exclusively relied on by the Master describe 17th-century English claims as anachronistic or absurd, they are primarily if not entirely referring to the 17th-century claim to the whole North Sea, English Channel and Bay of Biscay as closed English seas, right up to low-water mark on the continent. It is this overreaching, quite clearly, that has given the English claim a bad name among some later commentators—although, we must repeat, the attitudes of such commentators get us precisely nowhere in understanding what the actual law of the 17th and 18th centuries was. Not subject to any such criticism is the principle that always underlay the English claim and defined it except where special historic circumstances were alleged; that is, that an

coastal state is entitled to maritime sovereignty and dominion out to 100 miles or to the median line between its coasts and those of the opposite state.

International, like English, law in the 18th century emphasized this underlying, wholly sensible recognition of legitimate, exclusive national interests in territorial waters approximating 100 miles in width. Our detailed analysis of international law at S.B. 263-83 demonstrates that there was no consensus whatever by 1776, either in state practice or in doctrine, on any restriction of maritime sovereignty to limits narrower than 100 miles. That measure remained the dominant view throughout the century, and was still distinctly in the majority as late as 1795 (S.B. 276-78). The only other view to command any appreciable support favored 60 miles (S.B. 277).

To the limited extent that more narrow limits were tentatively articulated in the 18th century—line of sight, three leagues, two leagues, cannon shot and finally three miles[41] —those rules were proposed almost entirely for neutrality purposes, that is, to define the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another. As we demonstrate in detail at S.B. 121-24, 278-80, England and other nations could and did establish far more modest limits for this "neutrality" purpose than for other aspects of sovereignty and dominion. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. The Master's

[41] The Master concedes that the first identification in history of cannon shot with three miles was not made (by Galiani) until 1782 (Report, p. 45). The Master erroneously deduces that Galiani proposed three miles for "the limit of the territorial sea." In fact Galiani held that the limit, for neutrality purposes, should be two leagues, or twice the range of cannon. S.B. 308; Fulton, *op. cit.* at 563.

apparent assumption that any proposed limit of maritime sovereignty must have been proposed for all purposes is wholly contrary to the evidence of record.

The Master's position rests on a highly artificial theory of a hiatus in the law: that the 17th-century claims to whole seas vanished without a trace after 1688, leaving coastal nations with no rights of any kind out beyond low-water mark, and then after some undefined period of time territorial waters limited to cannon shot or three miles arose *ex nihilo*. Such a hiatus defies historical probability and common sense. It could not and did not happen, as O'Connell has recently shown. *Op. cit.* at 316-19. What happened, instead, was a gradual retrenchment from earlier claims to the extent they interfered with the free navigation desired by the more powerful maritime states, including England. The process of retrenchment was not far enough advanced by 1776, or even 1800, that a new rule could be regarded as having acquired the status of obligatory international law, which as we have seen requires a consensus.

But the crucial point is that the retrenchment never affected sovereign rights to exclusive exploitation of seabed resources, because the reason for the retrenchment had nothing whatever to do with that right. No 18th-century instance has been found of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas—the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustability of at least some of the fisheries—had no application to the resources of the seabed and subsoil, and thus that there was no reason for any doctrine of *res com-*

munis to be applied there.[42] Vattel's classic 18th-century question, "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" (App. 173-74, 225-26), has represented the law as well as the common sense of the matter whenever and wherever the presence of exploitable seabed resources has drawn attention to the question.[43]

Even the Master has some qualms about his "hiatus" theory, since he qualifies his conclusion (Report, p. 47) that in 1776 "neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast," by excepting "those limited areas, if any, which they had actually occupied," But as we show at pp. 120-29, *infra*, even those writers who at times have suggested an "occupation" test have set its standards so low as to require no more than a bare claim. They also concede tacitly or otherwise, as state practice clearly establishes, that it is the coastal state which has the exclusive right to *make* an occupation; and they have not advanced the proposition that the occupation must be effectuated *before* an exploitable resource is discovered. And in every sense in which occupation was practically possible or could reasonably be required, Britain and its colonies were in occupation of the marginal sea and seabed of the Common Counsel States during the 18th century, and their

---

[42] S.B. 281-83; Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 68, 413, 457 (1919); Colombos, The International Law of the Sea 69 (6th rev'd ed.); 1 Oppenheim, International Law 629-30 (8th ed. Lauterpacht 1955).

[43] The view that retrenchment in the limits of full territorial maritime sovereignty in the interests of free navigation entailed no such retrenchment from the prior law with respect to seabed and subsoil resources is directly supported by Judge Jessup's testimony in this proceeding. Indeed plaintiff's witness Professor Henkin substantially conceded it (App. 541).

exclusive rights were unchallenged. Moreover, the Master's apparent concession that areas close to the coast may have been "occupied," and therefore owned, requires a significant retreat from the alleged *California* doctrine that nothing was owned below low-water mark.

III.

THE AMERICAN COLONIAL CHARTERS CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT THE SEABED RESOURCES OF THE MARGINAL SEAS OF THE COLONIES.

Our detailed demonstration that the American colonial charters conveyed to their grantees the exclusive right to exploit the resources of the seabed of the marginal seas of the new English colonies is set forth at S.B. 156-231. We summarize that demonstration below.

At the outset it must be noted that here, as elsewhere, the Master embraces an "all or nothing" approach: he believes that, if it cannot be established that the charters conveyed "full sovereignty and dominion" (Report, p. 50) over the adjacent seas and seabed, then the States' case wholly falls. As elsewhere, the short answer is that the *only* issue in this proceeding is the exclusive right to explore and to exploit seabed resources; every other question and piece of evidence is relevant only insofar as it bears, either directly or by implication, on that question. The right here at issue can exist (as it concededly does today) without full territorial sovereignty or ownership of superjacent waters.[44]

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD NOT BEEN GRANTED SEA AND SEABED RIGHTS.

In view of the claims England was making in European waters in the 17th century and the state of English law at that time with respect to maritime sovereignty and dominion (see pp. 38-49, *supra*), it stands to reason that

[44] In the same paragraph from which we have just quoted, the Master seems to concede that the colonial charters granted the exclusive right to sea fisheries, as they surely did.

similar claims would have been made on this side of the Atlantic. Especially is this so when it is understood how closely the European developments coincided chronologically with the American colonization (S.B. 142-48) and how the same persons responsible for the chartering and establishment of the American colonies were intimately and intensely involved in vindication of the English law of maritime sovereignty and dominion in home waters (S.B. 148-62). The Master's reply is that "the concept of crown ownership of the seabed . . . was first authoritatively asserted in the works of Selden and Hale in the middle years of the 17th century after most of the colonial charters had been granted" (Report, pp. 49-50).

We have already shown that the Master was wrong in concluding that pre-1603 English law failed to recognize crown sovereignty and dominion; in particular we have relied on a much older legal tradition of seabed ownership and on Diggs' explicit assertion of crown ownership of the seabed in Elizabeth's reign and the enthusiastic implementation of his doctrines by the government at that time (p. 33, *supra*). Within the 17th century itself, the Master is wholly wrong in his assertion that English law failed to recognize crown ownership of the seabed until the writings of Selden and Hale were published. To demonstrate the contrary we rely particularly on the *Case of the Royal Fishery of the Banne*, decided in 1610 by England's highest court, the Privy Council (S.B. 49, 74, 98-100); on the Exchequer's decision in *Attorney General v. Philpott* in 1632 (S.B. 100-01); on the extremely influential treatise of Robert Callis in 1622 (S.B. 107-08); and on the official governmental treatise of Sir John Boroughs in 1633 (S.B. 64-65, 109). In addition, while Selden's treatise was not published until 1635, it was written in 1618 and was fully familiar to the king and the government from that date (S.B. 62).

Pertinent in addition are the many other early 17th-century authorities which, without specifically addressing

the question of seabed ownership, unambiguously affirmed English territorial sovereignty in the English seas, the right to exclude foreign fishermen therefrom, and English legislative, regulatory and judicial jurisdiction over activities in those seas. It never occurred to any one at this period to deny that the territorial sovereign owned all ungranted soil within the realm, to distinguish with respect to ownership or exclusive control between surface fisheries and sedentary fisheries or other seabed resources, or to regard any activities within the English seas as beyond the power of England to regulate. (See, *e.g.*, App. 807.) Thus the Master is refuted by all the early 17th-century evidence discussed at S.B. 47-124, including in particular James I's Fishing Proclamation of 1609 and the legal opinions preceding it (S.B. 56, 58; App. 675-77) (the proclamation had been in contemplation since the beginning of the reign in 1603, S.B. 142); [45] the Prime Minister's official affirmation of the 100-mile rule about 1610 (S.B. 58); Sir Julius Caesar's official legal opinions of 1610 and 1617 (S.B. 56-57; App. 712-15); James I's grant of a monopoly of whale fishing in 1613 (S.B. 85), and the writings of Welwood in 1613 (S.B. 61, 86), Coke in his *First Institute* of 1628 (S.B. 65), and Malynes in 1622 (S.B. 67, 89).

The record is conclusive that from the very beginning of the 17th century, and indeed prior thereto, English law and practice with respect to maritime sovereignty and dominion were so fully developed that it is incredible that England would have defined its new possessions in America as stopping at low-water mark.

Even if the Master were right as to the chronology — which he very plainly is not — and seabed ownership had dropped *ex nihilo* into English law in 1635, such a new

[45] Plaintiff's witness Professor Thorne admitted that acts of the King in Council, such as the proclamations of 1609 and 1635, were fully authoritative as establishing the law of England. App. 548.

principle of the common law would have been applied on this side of the Atlantic as fully as in England unless there had been some reason for it not to be so applied. Plaintiff's witnesses agreed that no such reason existed (see below), and the Master suggests none. Moreover, most of the Common Counsel States have charters dating from the period 1635-1691, when the Master admits the principle of seabed ownership was fully established.

B. THE OBJECTIVES OF BRITISH COLONIZATION REQUIRED THAT MARITIME SOVEREIGNTY AND DOMINION BE CLAIMED IN COLONIAL WATERS; AND IT WAS CLAIMED.

The Master argues (Report, pp. 51-52) that 17th-century English maritime claims "involved, at bottom, protection and security," determined by the need to defend the British Isles against hostile nearby nations; that these factors had no application to the new world; and that therefore England showed "little interest in the North American coastal seas" and failed to claim or to "occupy" them. These contentions are belied by massive evidence of record.

Even plaintiff, or at least plaintiff's witnesses, have not dared to take so extreme a position as the Master does on this point; they flatly disagreed with the Master's theory. Every one of plaintiff's four witnesses who testified as to the American colonial development—Professor Morris (S.B. 166; App. 538), Professor Thorne (S.B. 168; App. 555), Professor Henkin (S.B. 169; App. 540-41) and Dr. Kavenagh (S.B. 195; App. 537)—conceded that English law with respect to maritime sovereignty and dominion was carried to this side of the Atlantic, and that there is every reason to believe that the colonial charters would have granted and that the colonies would have claimed everything that England was claiming in European waters.

It is also wholly clear from the record that economic con-

siderations, not merely "protection and security," were dominant in English legal and political attitudes toward maritime rights, both in European waters and in those of the American discoveries. The cause which precipitated maritime issues to the forefront of consciousness and concern in 17th-century England was "at bottom" economic, not military: the matter of the fisheries (S.B. 167-70; App. 784-91, 830-46, 881-89). Likewise, economic aggrandizement through the acquisition and monopolization of newly discovered and valuable resources — conspicuously including fisheries, sedentary fisheries and minerals — was at the heart of the whole expansion of European civilization of which the North American colonization was a part. This was true from the beginning of the process in Elizabeth's reign (S.B. 41-45), and continued unabated and intensified from the beginning of the 17th century (*e.g.*, S.B. 80-86). The exploitation of fisheries and other marine resources was of paramount importance as an objective of North American colonization.

Evidence that, so far from taking no interest in the North American seas, the English authorities from the beginning applied to those seas the full panoply of English legal rights in European waters is collected at S.B. 170-78. Throughout the 17th and 18th centuries, government officials like Sir John Coke, Burchett, Lediard, the admiralty commissioners and the law officers of the crown (S.B. 171, 174, 177-78), international-law authorities like Gentili (S.B. 171), officially sponsored government writers like Boroughs and Selden (S.B. 172-74), unofficial writers like Codrington (S.B. 175), and British treaties with France and Spain (S.B. 175-76) all recognized that the sovereignty and dominion which England claimed in its own waters were fully applicable to the marginal seas of the North American colonies. And these views were fully implemented in practice (*e.g.*, App. 784-91).

C. THE CHARTERS EXPLICITLY CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT SEA AND SEABED RESOURCES.

For simplicity we confine our discussion to the language of two of the earliest charters, the second Virginia charter of 1609 and the New England charter of 1620. No one has denied that these charters are entirely typical of the others and that corresponding provisions appear in every other charter. The relevant provisions of all the charters are set forth and analyzed at length at App. 250-331.

The pertinent granting provisions of the second Virginia charter read as follows:

> "all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and North-west; *And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid;* Together with all the *Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries,* Woods, *Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which*

> *We, by our Letters Patents, may or can grant*, in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." S.B. 179; App. 263-64. (Emphasis added.)

Also granted was the right

> "to dig and to search for all manner of Mines of Gold, Silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and[any] part of the mainland not formerly granted to any other." S.B. 180; App. 264.

The letters patent further provided

> "that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." S.B. 180; App. 264.

The boundaries of the New England colony were stated in its charter of 1620 as follows:

> "that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land,

> from Sea to Sea, with *all the Seas*, Rivers, *Islands*, Creeks, Inlets, Ports and Havens, within the Degrees, Precincts, and Limits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." S.B. 186; App. 270. (Emphasis added.)

The granting language was as follows:

> "all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also with the . . . *Fishings*, *Mines*, and *Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones*, Quarries, and *all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining:* . . . to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands Territories, *Islands*, Hereditaments, and *Precincts, Sea Waters, Fishings*, with all, and all Manner their *Commodities, Royalties, Liberties, Preeminences, and Profits*, that shall arise from thence, with all and singular their *Appurtenances*, and every Part and Parcel thereof, and of them. . . ." S.B. 187; App. 270-71. (Emphasis added.)

The favorable-construction clause also was included:

> "And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." S.B. 187; App. 271.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." The charter language was construed in several contemporaneous authoritative documents as conveying "the seas and islands lying within 100 miles of any port or the said coast." (See p. 81, *infra*.)

The Master hardly refers to the above language, but dwells on other language which does not bear on the question at issue (Report, pp. 47-48).[46] He then finds that the charters are not "explicit" enough to convey sovereignty and dominion in the colonial seas (pp. 48-49). The decisive words of our charters are explicit as could be desired with respect to the only right at issue here: the ex-

[46] The Master is in error in alleging that in 1682 Delaware was regarded as stopping at the mouth of Delaware Bay and therefore as not including any land fronting the sea. The Cape Henlopen identified in the 1682 charters was not the present cape of that name, which *is* at the mouth of Delaware Bay, but the point where the present Delaware-Maryland boundary meets the sea. Tr. 2195-96; U.S. Geol. Surv. Bull. 1212, Boundaries of the United States and the Several States 132 (1964); Powell, "Fight of a Century Between the Penns and Calverts", 1, 3, 8, 10 (1932); Bayliff, Maryland's Boundary Controversies 9 (1950). It was recognized from the beginning that Delaware was bounded not only by the "River and Bay of Delaware" but also by the "Eastern Sea." U.S. Exhibit 137, p. 238.

clusive right to exploit seabed and subsoil resources. Even apart from its use of legal terms such as royalties (pp. 73-75, *infra*), the Virginia charter granted *in haec verba* all the soils, mines, pearls and previous stones, waters and fisheries within both the land territory of the colony and the precincts[47] thereof both by sea and land. If possible even more explicitly, the New England charter granted all fisheries, mines and minerals both on the mainland "and also within the said islands and seas adjoining." What more could possibly be needed? If it be objected that no fixed limit is set to the "precincts" or "seas adjoining," we address the question of what the limit was at pp. 81-84, *infra*. But the Master's contention that the charters created exclusive rights of exploitation in *no* adjacent seabed, within any limit whatever, is palpably in conflict with the express words of the charters.

The Master seeks to contrast the language of the colonial charters with other English charters of 1610, 1621, and 1662. Noting that these latter documents conveyed "the seas" out to stated limits offshore, the Master asserts that this is proof that the crown used such language whenever the conveyance of adjacent waters and seabed was desired (Report, pp. 47-48). In view of the explicit charter language quoted above, the differences in phrasing between the charters of the Common Counsel States and other charters relied on by the Master cannot warrant a conclusion that

[47] There is no question that the term *precincts* referred not only to the area within boundaries previously described, but also to the environs or surroundings thereof. See, *e.g.*, The Oxford Universal Dictionary on Historical Principles 1564 (1955 ed.); 3 Oxford English Dictionary 1247 (1933).

The use of *appurtenances*, p. 70, *supra*, is likewise significant. Under the rule of the *Grisbadarna* case, p. 52, *supra*, during the period the marginal seas would have "automatically" passed as an "inseparable appurtenance" of the land territory without any explicit reference at all. Under modern international practice, likewise, territorial-sea and continental-shelf rights are not specified in acts of independence or cession; they pass automatically with the land. Thus the charters are far more explicit than was necessary or would be customary today.

our charters conveyed nothing in the adjoining seas and the others conveyed everything. And the Master's own comparison certainly undermines his own earlier contention that 17th-century law did not include maritime territorial sovereignty and that seabed ownership was not recognized in English law until the middle of the century.

D. THE CONVEYANCE OF JURISDICTION, FRANCHISES AND ROYALTIES CONFIRMS THAT THE CHARTERS INCLUDED SEABED EXPLOITATION RIGHTS.

The Master rejects (Report, pp. 49-50) our contention that rights in the colonial seas which included the exclusive right to exploit sea and seabed resources were conveyed as part of the jurisdiction, franchises, and royalties, both by sea and land, which were granted in all the charters.

The Master's conclusion rests in part on his premise that the 17th-century English admiralty jurisdiction was purely "protective," a premise we have shown to be wrong at pp. 41-44, *supra*. Indeed, plaintiff's witness Dr. Kavenagh conceded that the "jurisdiction" conveyed by the charters included the exclusive right to control and to license the fisheries of the American marginal seas (App. 535-36).

The Master gives virtually no reasons for his rejection of "franchises" as relevant to the issue here. We have shown that the term *franchises* was in common use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore all pointed out. Exhibit 728, p. 709; Exhibit 729, pp. 20, 33.

As to "royalties," the Master argues that a list of prerogative rights in *De Prerogativa Regis*, a document written *in the early 14th century*, does not specify the right here at issue. The fact is that in 17th-century usage the term *royalties* (sometimes *regalities* or *regalia*) was universally understood to include every one of the crown's rights

[48] The record is replete with evidence that puts this point beyond question. App. 254, 649, 675-77, 716, 719, 777, 791-94, 823, 852, 880; S.B. 13, 58-59, 60, 73, 74, 78, 79, 81, 83, 86, 89, 90, 96, 109, 112, 113, 114, 116, 133, 181.

of sovereignty and property in the adjacent sea and seabed, specifically including the exclusive right to seabed resources, and is the normal term a 17th-century conveyancer would have used to grant such rights.[48] The Master himself elsewhere concedes (Report, p. 33) that the crown's rights of ownership of the seabed and the resources thereof were referred to in the 17th century, "in conventional terminology, as the crown's royalties or regalia." Plaintiff's own witnesses likewise conceded this point (App. 555-58).

The Master goes on (p. 50) to argue that general grants of franchises and royalties conveyed nothing; that these words were mere nullities in the charters and that more specific words were necessary. The first answer, of course, is that more specific, wholly adequate words *are* present. For example, the New England charter of 1620 conveyed all "Fishings, Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining" (S.B. 186; App. 270-71). Every other charter contains similar language. The Master simply ignores it.

The second answer is that the principle of construction on which the Master relies stopped far short of a general rule that a grant of all royalties and franchises necessarily conveyed nothing. The rule correctly stated was that where the language of a grant to "a common person," 17 Viner, *General Abridgement* 133 (2d ed. 1792), was so vague as to create ambiguity as to the intent of the grantor, the grant would be construed narrowly with respect to prerogative or governmental rights since it would not be presumed without a clear showing that the crown intended to convey such rights to a private person. S.B. 199-200; 17 Viner, *op. cit.* at 138-39; *Grabham v. Geales*, 81 Eng. Rep. 995 (1619). The rule had no application to the colonial charters, which

48/

created governmental, viceregal bodies with palatine prerogatives, and which expressly included provisions requiring the construction most favorable to the grantee (pp. 69-71, *supra*). Massive authority demonstrates that this view of the rule and the charters is the correct one.[49]

Finally, in *Martin*[50] and *Shively*, cited in the margin, this Court expressly relied on the "royalties" language of the charters as including a conveyance of the soil under all navigable waters, without making any distinction between inland waters and the marginal sea. The application of this principle to embrace colonial ownership of "the soil under the sea" was expressly recognized in *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 351-53 (1851). For the contrary proposition the Master relies on *Attorney General v. Trustees of the British Museum*, [1902] 2 Ch. 598; but as demonstrated at S.B. 200-01, the court's holding did not apply the rule embraced by the Master at all, but expressly reserved judgment on that point. The Master also relied on an opinion by the law officers of the crown, issued in 1723, that the New Jersey charter did not convey royal mines. The opinion, Chalmers, *Opinions of Eminent Lawyers* 141-42, did not mention the word royalties, and its authors may have overlooked its presence in the charter.[51]

---

[49] S.B. 191-204; Dyke v. Walford, 5 Moore's Rep. 434 (Privy Council 1846); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 14, 16 (1894); Gould, The Law of Waters 70-72 (3d ed. 1900); Angell, Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof 36-38 (1826).

[50] In *Martin* this Court held that the strict-construction rules "apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands," and thus had no application to a governmental charter. 41 U.S. (16 Pet.) at 411. And the Court relied on the charter conveyance of "other royalties" as granting the soil under navigable waters. *Id.* at 413.

[51] The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, placing them in the position of "common persons"; and the opinion could well have

E. THE CHARTERS CONVEYED SEAS TO THE SAME DISTANCE TO WHICH ISLANDS WERE CONVEYED.

The second Virginia charter, in typical language, conveyed "all the islands lying within 100 miles along the coast." At S.B. 182-85 we demonstrate from 17th-century usage that such language was regarded either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. That view is confirmed by a grammatical analysis of a number of the charters (S.B. 184-85). Plaintiff's own witness Dr. Kavenagh admitted, on the basis of this analysis, that charter language conveying islands must be read as creating a "sea of the province," a "sea within the premises," and "the said seas . . . aforegranted" within which royalties were then conveyed (App. 528-35).

The identification of offshore islands with the intervening seas, as well as the 100-mile limit, can be traced back to the famous 14th-century jurist Bartolus (S.B. 183). Turning the argument on its head, the Master responds (Report, pp. 50-51) that Bartolus, while conceding to a coastal state offshore islands and exclusive maritime jurisdiction out to 100 miles, did not concede full sovereignty or ownership. The Master goes on to say that he finds nothing in the English writers of the 17th century contrary to Bartolus' doctrine. Quite apart from the fact that full sovereignty or ownership of the sea is unnecessary to the States' claims (p. 63, *supra*), the Master's reasoning is unpersuasive and inconsistent. The Master elsewhere asserts that 17th-century English law had advanced far be-

---

reached its result on the ground that the surrender included royalties (as was held by this Court, with respect to this very surrender, in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)). The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

yond that of earlier centuries w[illegible] to maritime sovereignty and dominion, and that [illegible] least by the middle of the century crown ownership of the seabed was fully recognized in English law. W[illegible] Bartolus shows is that both the 100-mile limit and the habit of thought which linked national rights in offshore islands and in the surrounding seas were long established by the 17th century. Those aspects of Bartolus' thought, as they influenced subsequent generations, are highly relevant in construing the "islands" language of the charters, even though the content of the national rights which he recognized had expanded by the 17th century.

The Master also argues that our contention as to the "islands" language "loses its force" because allegedly we do not contend that the third Virginia charter, which conveyed islands within 300 leagues of the Virginia coast, conveyed sea and seabed resources to that distance. The specific purpose of the expanded limit in that charter was to include the islands of Bermuda within the Virginia colony (App. 268). It is surely not unreasonable, in construing that charter, to take into account the fact that no 17th-century authority argued for national maritime rights as far as 300 leagues from shore,[52] while the 100-mile limit in the second Virginia charter was wholly in accordance with law and practice of the time. It may be, nonetheless that the third charter was intended to convey the sea out to 300 leagues; that construction is supported by language declaring a subsidiary purpose of the charter to be "a more ample Extent of their Limits and Territories into the Seas

[52] An exception was sometimes made in the case of waters whose opposite shores were under the same sovereignty; see S.B. 171, 252; App. Vol. III, Exhibit 816. It may be that at this early date the charter draftsmen believed that Bermuda was so situated that its surrounding seas could be claimed under this rule, or that Bermuda was itself regarded as a coast opposite Virginia justifying the assertion of sovereignty over the waters in between.

adjoining . . ." (App. 267). In any event, the claim was cut back to the earlier 100-mile boundary when Bermuda ceased to be part of Virginia later the same year (1612) the third charter was issued (App. 268-69). And the language just quoted makes it clear beyond peradventure that the customary "islands" language of the charters was understood as creating "limits and territories" in the marginal seas.

Finally, the Master states that in the second Louisiana case, *United States v. Louisiana*, 363 U.S. 1 (1960), this Court held that an early 19th-century boundary formula referring to islands within certain limits did not embrace the surrounding waters. There the Court declared that the formula in question did "not appear on its face to mean to establish a boundary line that distance from the shore," and that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. 363 U.S. 1 at 81-82. In his separate opinion Justice Black, who had written for the Court in *California*, conceded that the "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. *Id.* at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

F. THE "FREE FISHING" CLAUSES CONFIRM THE OTHERWISE EXCLUSIVE MARITIME RIGHTS CONVEYED BY THE CHARTERS.

The Master never mentions the clauses, found in a number of the charters (S.B. 207-10), which saved and reserved to some or all classes of British subjects the right of free fishing in the seas of the colonies in question. The presence of these clauses is further proof that in their absence the

general language of the charters would have conveyed to the patentees a wholly exclusive right to the marginal-sea fisheries. No distinction is made between surface and sedentary fisheries. Foreigners were never included in the classes to whom free fishing was reserved. An eminent Maryland lawyer, Daniel Dulany, in 1766 drew the obvious conclusion that the colonies had the right to exclude from their seas all fishermen other than those who were express beneficiaries of the free-fishing clauses (S.B. 208-10). Angell, the leading early 19th-century American scholar on the law of the marginal seas, agreed (S.B. 209-10).

G. MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR MARITIME SOVEREIGNTY AND DOMINION.

Some of the many maps introduced in this proceeding are reproduced in Volume III of our Appendix; see S.B. 251-54 for our detailed discussion of them. Several of these maps, not mentioned by the Master, strongly support the States' claims. For example, Exhibits 815, 615 and 616 are maps, dating respectively from the 17th century, 1726 and 1733, which show the colonial boundaries in New England as extending out into the sea. Exhibit 816, dating from 1680, shows maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic ocean to the coast of North America. Exhibit 820, a portion of a map of 1720, shows the Carolina boundary, identified as the "limit of King Charles II granted to the present proprietors of Carolina in 1663," as not stopping at the coast but rather extending a considerable distance into the sea.

Neither does the Master mention Exhibit 821, which is an early 18th-century French map of what is now the United States. The English possessions have been shaded

in, and the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric—usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect—in most areas the shading extends approximately 100 miles from the coast.

Exhibit 816, mentioned above, also includes, south of the southern "bound" of the "dominion of the British seas," the designation "sea of Carolina, Virginia, Maryland, New York, New England." Exhibits 817, 818 and 819 designate the colonial marginal seas as the "sea of the English Empire" or the "Sea of the British Empire." Exhibit 613, dating from about 1720, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York."

The Master holds that these are mere geographical designations which involved no claim to sovereignty or ownership of any kind. But a term like "Sea of the British Empire" is obviously too unwieldy in length and political in language to be appropriate for use as a mere geographical designation. And as to the maps which name the sea of each colony separately, the fact of course is that these "seas" were in no sense separate bodies of waters geographically, but all parts of the Atlantic Ocean; the maps' insistence on dividing them by separate names corresponds to no geographical fact, but does correspond precisely to political facts.

For his view the Master relies on Sir Philip Medows, who denied that such terms as "the English seas" carried any political or proprietary connotation (Report, p. 55 n.). Medows, however, was opposed to the then-dominant

opinion. While Medows vigorously supported England's claim to full sovereignty and dominion in a belt of marginal waters around its coasts, of which belt he thought 14 miles was the *minimum* reasonable extent (S.B. 68-69), Medows did oppose the English claim, fully maintained in his time, to ownership of the entire "English seas" up to low-water mark on the shores of the continent. His minority view as to the significance of the term "English seas" can hardly be taken as authoritative with respect to the common understanding of the far more explicit and political designations on the maps in this record.

H. THE RECORD ESTABLISHES A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE AMERICAN COLONIES.

The double charter of 1606, which conveyed the entire coastline of what are now the Common Counsel States, granted all islands within 100 miles of the coast (App. 261-62). Preservation of that 100-mile belt in subsequent charters which did not expressly mention it, and also the fact that the 100-mile limit for islands was regarded as a conveyance of the seas out to that limit, are conclusively demonstrated by a series of contemporaneous documents construing and applying the New England charter of 1620. That charter, while conveying the adjoining seas and islands, stated no exact limit for the maritime belt. Yet in three subgrants of portions of its territory made during the 1620's (App. 641-45), the Council for New England described its 1620 charter as having conveyed the land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid."

These documents, which the Master never mentions, shed decisive light on how we are to interpret both the 1620 charter and the many other charters which speak of the adjacent islands and seas without specifying any particular

distance. The Council doubtless based its construction on two factors: first, that 100 miles was generally understood to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial belt all up and down the Atlantic coast and that such boundaries were to be deemed incorporated into subsequent charters for particular areas. These, as well as other grants by the Council (S.B. 207-08; App. 1003-05), make the identification of island limits and maritime limits clear beyond peradventure. Further, the Council's express conveyances to its subgrantees of the seas out to three leagues, three miles and 15 miles of the coast also confirm that it viewed the 100-mile limit as incorporated by reference in the 1620 charter, that it regarded that limit as applicable to seas as well as to islands, and that it preserved to itself the ownership from those varying limits out to 100 miles.

The thrust of these documents, which the Master ignores, is explained and supported by the fact that 100 miles were generally understood in English and international law at the time to be the breadth of the territorial sea, absent special historical circumstances (pp. 47-54, *supra*). Thus it was entirely rational in the 1620's to read the New England charter as incorporating the 100-mile limit by reference to existing practice as well as the earlier charter of 1606. The same meaning may properly be imparted to the other colonies whose subsequent charters mentioned no express limit.

Certain of the colonies (*e.g.*, New Hampshire in 1635, App. 312) were granted island (and thus sea and seabed) belts of less than 100 miles, such as five leagues. In light of the establishment in 1606 of the 100-mile belt all up and down the coast, which moreover entirely conformed to the English and international law of the period, the crown in granting lesser belts to certain of the later colonies clearly

did not renounce the residue, but rather retained that residue for itself—just as the Council for New England on several occasions conveyed to subgrantees narrower belts than it was simultaneously asserting it itself possessed (S.B. 210-16). Where the crown granted only a limited part, retaining the remainder for itself, its rights and royalties passed to the States at the time of the American Revolution. (See pp. 94-98, *infra*.)

Even if the evidence did not establish a uniform 100-mile belt all along the North American coast, it does not at all follow that the exclusive right of exploitation under overall British ownership was limited in the case of each colony to the width specified in its charter. Certainly the crown frequently granted less than all it possessed, and during the 17th century the crown never took the view that its territorial sea was as constricted as, for example, the five leagues granted to New Hampshire in 1635. Rather, the proper conclusion would be that the maritime belt of exclusive exploitation was regarded as not finally fixed and defined as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.[53]

From this conclusion it would follow that the States at independence inherited a right to hold continental-shelf rights to whatever distance was then recognized, or would come to be recognized in the future, as appropriate and proper for the exclusive seabed jurisdiction of a coastal sovereign. While no one doubts today that the exclusive exploitative rights of coastal nations in the continental shelf extend to the point where the depth of the sea reaches 200

[53] Judge Jessup has demonstrated that international law from prior to the 17th century to this day has recognized such a concept with respect to seabed resources, even though views as to the maximum permissible limit of full territorial surface rights have fluctuated upwards and downwards during the period. (See pp. 111-29, *infra*.)

meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast), controversy continues as to whether exclusive rights extend farther. Plainly the fact that the definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at at particular time in the past.

I. RIGHTS OF SOVEREIGNTY AND DOMINION WERE CLAIMED AND EXERCISED IN THE MARGINAL SEAS OF THE COMMON COUNSEL STATES DURING THE COLONIAL PERIOD.

The record plainly shows that rights of sovereignty and dominion over the marginal seas and seabed of the Common Counsel States were asserted and exercised during the colonial period to the extent the question arose. The Master assumes that every instance of a colonial claim or practice has no significance beyond the precise area and the precise practice involved. We submit that, to the contrary, the evidence is chiefly relevant as indicating an underlying, universally shared view of the law which to a great extent was assumed rather than articulated.

Whenever the occasion arose—whenever exploitable resources existed, and especially whenever any challenge was made to the colonies' exclusive rights—the colonies promptly acted to assert and to exercise maritime sovereignty and dominion. The fact that such occasions were relatively rare is accounted for by the state of technology and the previously mentioned circumstance (pp. 53-54, *supra*) that the marginal seas were occupied in fact by the colonies, with no other power able to gain a foothold because of distances and the capacity of ships. (The Master himself admits, Report, p. 57, that in the case of the Common Counsel States he who controlled the shore in fact controlled the coastal fisheries.) Neither the Master nor the plaintiff has produced a single example of foreign ex-

ploitation of marine resources in the marginal seas or seabed of the Common Counsel States during the colonial period. The entire record as to the law and practice of the time puts it beyond question that any such foreign exploitation would have been instantly and successfully challenged. Plaintiff's witnesses so conceded (App. 535-36, 538-42, 554-55).

The most significant proof is the massive evidence of record, summarized at S.B. 222-23 (see also App. 830-46, 881-85, 893-94), regarding the history of Canadian waters. There the presence of rich exploitable resources led to wars between England and France over the fisheries and the adjacent coasts. Both England and France vigorously asserted that the sovereign of a coast has an exclusive right to the fisheries for many miles out — far beyond three miles; generally 100—in the absence of a treaty to the contrary. By the Treaty of Utrecht of 1713 the French conceded their exclusion from the Nova Scotia waters up to 30 leagues, substantially 100 miles (S.B. 223-24). A map used in the treaty negotiations leading to the Peace of Paris of 1783 (App. Vol. III, Exhibit 327) demonstrates that the British regarded this limit as applicable to the waters of the Common Counsel States as well.

When some concessions were made by treaty to the French in Newfoundland waters, the American colonists demonstrated their legal view of the matter by protesting those concessions as harmful to their rights and inconsistent with English sovereignty (S.B. 226-28). In repeatedly rejecting Spanish claims to fish in Newfoundland waters, the British constantly relied on the legal principle that the owner of a coast owns the fisheries in adjacent waters except only as a vested right (based on long use) or a treaty provides to the contrary (S.B. 230-32). All this happened during the 18th century, a period when the Master claims the earlier British view of maritime sovereignty and dominion had vanished without a trace.

It defies reason and human experience to assert that the Canadian experience took place in a vacuum and has no relevance as indicating the general legal views and practices of the time, applicable to the waters of the Common Counsel States as elsewhere. Obviously, the areas where the issue was as a practical matter most acute furnish the richest body of evidence. If the situation had been the same in the waters of the Common Counsel States—if resources rich enough, and near enough to foreign bases, to attract foreign exploitation, had been present in those waters—there cannot be the slighest doubt that the British and colonial posture, based on the same underlying legal attitudes, would have been the same as in Canada—as in fact it was in Maine waters, the one place south of Canada where the issue did arise (App. 784-91, 838-46, 882-89, 903-04). Nor can there be any doubt that the same legal principles would have been applied in the case of exploitable subsoil mineral resources in the marginal seas if those had existed (S.B. 240-46). Indeed, it would have been both easier and more important to ensure the exclusion of foreigners from the exploitation of such resources than to exclude them from the fisheries: the permanent and immobile installations necessary for mining would have been far easier to regulate than the fisheries, and it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters.

As the Master admits (Report, pp. 56-58), the substantial body of evidence relating to the fisheries of the Common Counsel States, including sedentary fisheries, demonstrates colonial control, licensing, grants of exclusive fishing rights, regulation and exclusion of foreigners (S.B. 219-22, 233-41).[54] The Master asserts, however, that all this evi-

[54] One of the principal duties of the colonial admiralty officers, in the American as in the English seas, was the exclusion of foreign fishermen from adjacent waters. S.B. 220, 248-49; App. 784-91.

dence is irrelevant because he believes the fisheries in question were relatively close to shore. He concludes (without any evidence of record) that all of it was within three miles of the coast; and he therefore argues that it is irrelevant to the maritime areas beyond three miles with which this litigation deals.

The difficulty of the Master's reasoning is that *any* evidence of colonial sovereignty or dominion below low-water mark is enough to undermine the rationale of *California*, which was that evidence was lacking to show that the colonies owned the three-mile belt. No one claims that the three-mile limit had ever been heard of during the colonial period; it was invented only later. Once it is established (as it clearly is and as the Master virtually concedes) that the colonies possessed and exercised rights of sovereignty and dominion below low-water mark, the alleged *California* doctrine stands refuted and the only question is how far out those rights extended. On the basis of the governing English and international law and practice, the Canadian experience and the colonial charters themselves, colonial rights extended far beyond three miles and were generally recognized to extend out to 100 miles.

Further evidence of colonial title to submerged lands is supplied by colonial ownership and grants of derelict lands reclaimed from the sea (S.B. 241-43). While the Master recognizes the facts, he reasons that such ownership did not involve ownership of the lands before they emerged from the waters, but only afterwards (Report, p. 58). This ignores the principle, fully incorporated and well understood in English law from at the latest the time of Diggs onward, that the crown owned derelict lands *because* it had owned them while part of the seabed and the retreat of the waters caused no change in ownership (S.B. 36-38, 99-101, 110-12).

The New England fishing controversy, at the very outset of the colonial period, also illustrated the exclusive maritime rights conveyed by the charters and the intense awareness of those rights on the part of the charters' recipients (S.B. 219-22). The controversy involved a claim by Virginia that, by the double charter of 1606 (which divided the entire Atlantic seaboard between the "Southern . . . Colony" (Virginia) and the "Northern Colony" (New England)), its citizens had a right to fish in New England waters, from which they were being excluded by the grantees. The Privy Council orders of 1620-21 (expressly stated that Virginia would have the very limited right they conceded it "by the consent of both colonies" (S.B. 219; App. 678-79). The Master seeks to use the controversy to support his own conclusions by reasoning that, by allowing Virginia's claim, the Privy Council showed that the crown retained "ultimate control" of the fisheries for itself (Report, pp. 56-57).[55] However, Virginia had never argued that New England's charter rights should be overridden, but rather that the reciprocal fishing rights it claimed could be found in the double charter of 1606 itself; and, as noted, New England agreed to the Privy Council's proposal.[56] The rights conceded to Virginia themselves represented only a limited exception to the exclusive maritime dominion established by the charter. Finally, the Privy Council orders excluded other Englishmen, and that exclusion was made explicit a few months later (S.B. 219-20; App. 1001-02). No one ever suggested that *foreign* fishing should be permitted. The Council for New

[55] Other difficulties aside, the Master's argument is wholly inconsistent with his position that the law and practice of exclusive maritime dominion were not imported to this side of the Atlantic by the charters or otherwise.

[56] Of course, even if the crown retained some degree of control, that passed to the States, with other crown rights, at the time of the Revolution. See pp. 94-98, *infra*.

England zealously enforced its rights by excluding all unlicensed fishing except as permitted by the agreement of 1620-1621 (App. 784-91).

Among the many indications of record bearing on maritime sovereignty and dominion during the colonial period which are not discussed by the Master, we shall mention only the debates in Parliament leading to the passage of the New England Restraining Act of 1775, which prohibited the New England colonists from fishing in American waters (S.B. 256-57). Lord North, Prime Minister, justified the act on the ground of British ownership of the fisheries in the American seas (App. 847). Thus at the very end of the colonial period the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the measure, no one opposed it on the ground that the American seas and their fisheries were incapable of ownership. Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process [i.e., to revoke the charters] seems equally a violation of all natural and all civil right." 3 *Parliamentary Papers* 519 (1797). Obviously, the positions of both sides in this debate are squarely contrary to the Master's views.

J. THE BRITISH AND DOMINION CASES RELIED ON BY THE MASTER WHOLLY FAIL TO SUPPORT HIS CONCLUSIONS.

The Master relies (Report, pp. 52-53) on *Re Off-Shore Mineral Rights of British Columbia*, [1967] Canada L. Rep. 792, 65 D.L.R. (2d) 364, U.S. Exhibit 34, and *Bonser v. La*

Macchia, 43 Austr. L.J. Rep. 411 (1969), U.S. Exhibit 18, for the proposition that provincial ownership rights (in the case of British Columbia) and state territorial limits (in the case of New South Wales) stopped at the water's edge. The Master believes these cases support his conclusions as to the interpretation of the 17th-century American colonial charters. He seems to think that we object to reliance on these cases only on the ground that they were decided "long after 1776" (Report, p. 54), and finds such an objection not persuasive, reasoning that the cases are good authority to the extent that they discuss pre-1776 English law.

The short answer is that (1) these cases do not to *any* extent discuss pre-1776 English law: there is not a word in them dealing with the law of that period;[57] and (2) neither case dealt with colonial charters, let alone charters from the period here under discussion.

For analysis of the *British Columbia* opinion, see App. 85-89; S.B. 477-83. British Columbia never had a colonial charter; it came into existence as an unchartered British administrative unit by an act of parliament of 1858. The Canadian court's conclusion that that act reserved maritime rights to the crown, rather than delegating them to the British Columbia authorities, bears no relation whatever to the 17th-century colonial charters involved here. At S.B. 477-83 we show that other Canadian cases strongly suggest that a different result will be reached when the rights of Canada's Atlantic provinces, which did have 17th-century charters, are litigated, which they have not been as yet.

Bonser v. La Macchia (analyzed at App. 83-85; S.B. 483-

[57] The only exceptions are a few passages in Judge Windeyer's individual opinion in *Bonser*, U.S. Exhibit 18 at 289-98, in which he recognized that the older English law had recognized extensive rights of sovereignty and dominion in the marginal seas. Nowhere does he say that the law changed before 1776.

84), dealt solely with the power of the Australian federal government under a particular Australian statute to regulate offshore fisheries beyond three miles; the court unanimously held in favor of the regulation. The Master to the contrary, *Bonser* did not purport to resolve, and did not resolve, the question of territorial boundaries of the Australian states in the marginal seas, let alone the ownership of the seabed as between the Australian states and the federal government. On the question whether the territorial limits of the Australian states extend below low-water mark, *Bonser* is wholly inconclusive: two judges (Kitto and Menzies)[58] opined in the affirmative, two (Barwick and Windeyer)[59] in the negative and two (McTiernan and Owen) found it unnecessary to decide the question.[60] The issue of continental-shelf ownership was not addressed at all.

Thus the Master wholly misunderstood the alignment in the case: Judge Barwick wrote merely as one of six judges who all reached the same result, and there was no majority in favor of his view that the limits of Australian states did not extend below low-water mark. Even his individual view on that subject is irrelevant here, since the Australian states, like British Columbia, were unchartered administrative units erected in the 19th century. The allocation of powers between the imperial crown and overseas provinces in 19th-century British imperial law and practice gives no guidance whatever as to what was granted to the North American chartered colonies more than two centuries earlier, much less as to what the crown then claimed for itself. Finally, even if the question of territorial boundaries had been settled in *Bonser*, which it was not, that would not have settled the matter of continental-shelf

[58] U.S. Exhibit 18, pp. 285, 288-89.

[59] *Id.* at 277-80, 293.

[60] *Id.* at 284, 299.

rights, which were never mentioned or involved in that litigation. The question of continental-shelf rights is still wholly open in Australian law (S.B. 484), and is now in litigation there.

The Master also relies on the English decision *Queen v. Keyn*, decided in 1876 (Report, pp. 53-54), to demonstrate that "the realm . . . ended at the low-water mark on the coast." An exhaustive analysis of the many opinions in that case is in the record (App. 48-89). It demonstrates that the holding of the case was limited to the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect (App. 80). That holding was based on an erroneous analysis of the history of the admiralty jurisdiction (App. 55-58; see pp. 32, 41-44, *supra*). All the judges acknowledged the existence of various crown rights in the marginal sea, *and a majority of them, unlike Cockburn on whom the Master exclusively relies, believed that the marginal sea was part of the territory of England* (App. 58-74, 80-81). The holding of *Keyn* as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends *and has always extended* over the open seas adjacent to the coast of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defence and security of such dominions" (App. 75-76, 646-47). (Emphasis added.) [61]

[61] The Master relies (Report, p. 46 n.), apparently for the proposition that the Territorial Waters Jurisdiction Act, in spite of its language, did not repudiate the *Keyn* decision, on the case of Harris v. Owners of the Steamship Franconia. But that case was decided *before* enactment of the Territorial Waters Jurisdiction Act. Thereafter, the British courts recognized that the Act had established that the decision in *Keyn* "was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that it is and always has been the law of this country." Carr v. Francis Times & Co., (1902) A.C. 176, 181.

In addition, both Cockburn's and many of the other opinions in *Keyn* acknowledged that in earlier centuries the English law of maritime sovereignty and dominion had been far more spacious. Thus even Cockburn's dicta, taken on their own terms, asserted a change in English law after 1776—a change that would have no effect in impairing the State's claims here. And since *Keyn* never mentioned the charters or dealt with the colonies at all, there is no wisdom to be found there as to whether the English law of seabed ownership was carried to this side of the Atlantic or whether, if so carried as we contend, the law reserved the seabed to the crown or assigned it to the colonies.

Finally, this Court itself disposed of the *Keyn* dicta in *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891), observing that *Keyn* dealt only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign juridiction in territorial waters or on the right of coastal States to control sea fisheries.[62] The British courts have uniformly rejected the authority of *Keyn*, have refused to allow the *Keyn* dicta to cast any doubt on the traditional British law, and have uniformly reaffirmed the sovereignty and dominion of the crown in the marginal sea (S.B. 469-71 and 478-83). Among many examples, it is sufficient to cite *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916) (S.B. 469-70; Exhibit 165), in which the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the *Keyn* dicta as unsound and reaffirmed the traditional doctrine of crown ownership of the seabed.

---

[62] For other authoritative comments on the *Keyn* case, see App. 138-40, 890-92, 977-87; Exhibits 162, 163, 164, 165; U.S. Exhibit 7, pp. 109-11; U.S. Exhibit 9, pp. 51-53, 59-61, 65-73.

IV.

THE STATES INDIVIDUALLY SUCCEEDED AT THE REVOLUTION TO ALL THE MARGINAL-SEA RIGHTS PREVIOUSLY HELD BOTH BY THE CROWN AND BY THE COLONIAL GOVERNMENTS, AND HAVE NEVER SURRENDERED TO THE FEDERAL GOVERNMENT THE EXCLUSIVE RIGHT TO EXPLOIT SEABED RESOURCES.

A. THE STATES WERE INDIVIDUALLY SOVEREIGN DURING THE REVOLUTIONARY AND CONFEDERATION PERIODS AND INHERITED ALL RIGHTS OF SOVEREIGNTY AND DOMINION BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS.

At independence each State became a complete sovereign, recognized as such both by our law and by international law. Accordingly, the States inherited directly all rights of sovereignty and dominion appurtenant to their territories which had been previously held either by the crown or by the antecedent colonial governments. Since the maritime claims of the crown and the colonial governments were well established, as we have already shown, it follows that they were inherited by the new States in the most direct and embracing manner. Under the constitutional law of the revolutionary period the "United States" was not regarded as a separate entity distinguished from the States, but rather as the States themselves, acting in confederation or concert for the winning of the war. Ultimate sovereignty was regarded as vested in the people of each State separately (S.B. 286-90). Congress consisted of the States, acting as all states do through their agents; and the State agents who collectively made up the Congress possessed only those powers

specifically delegated to them (S.B. 290-94). The States were individually recognized in treaties, and individually carried on substantial foreign-affairs and defense activities (S.B. 299-305; App. 230-35). Juridically the United States consisted, *de facto* before the Articles of Confederation and *de jure* thereafter, of a federation; and the international law of the period, like the Articles of Confederation themselves, was wholly clear that each state of a federation was a sovereign in the fullest sense (S.B. 294-99). These propositions, throughout our history, have commanded the all-but-universal assent of statesmen and scholars alike (S.B. 306-14).

The evidence for these propositions, discussed in detail at S.B. 286-314, is massive and overwhelming. This Court has repeatedly recognized that at independence each State became fully sovereign, in the international-law sense as in other senses, and succeeded to every territorial and property right both of the colonies and the crown; whatever the United States subsequently obtained was granted to it by the States.[63] The dicta to the contrary in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), much criticized by commentators and tacitly repudiated on

---

[63] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (S.B. 341-44); Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795) (S.B. 344-50); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (S.B. 350-55); Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 424 (1799) (S.B. 355); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800) (S.B. 355); McIlvaine v. Cox's Lessee, 8 U.S. (4 Cranch) 209 (1808) (S.B. 356); Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810) (S.B. 356); Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816) (S.B. 356); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (S.B. 358-60); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (S.B. 360); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (S.B. 362-64); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588-92 (1839) (S.B. 308-09, 364-65); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (S.B. 365-70).

several occasions by this Court itself (S.B. 371-75), are contrary to this otherwise unbroken line of authority and are without historical foundation.

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED.

Even if the States had not themselves achieved sovereign independence in 1776, they would still have inherited all existing rights in the marginal sea and seabed. If, contrary to historical fact, it is assumed that external sovereignty—comprising international recognition and the foreign-affairs and defense powers—had passed directly to a single "national government" at independence, the States nonetheless succeeded to antecedent territorial boundaries and property rights. The right here at issue is the exclusive right to exploit the seabed resources of the marginal seas. That right, essentially a right of ownership of property, has nothing to do with "external sovereignty." No matter when and how external sovereignty was transferred, that transfer did not carry with it the cession by the States of any portion of their territory or of any property owned by them. We have already shown (pp. 15-24, *supra*) that neither the constitutional concept of external sovereignty nor the practical exigencies of the foreign-affairs and defense powers require any cession by the States of any property or territory below low-water mark. This was the historical understanding as well.

As detailed evidence shows (S.B. 314-28), it was the universal understanding during the revolutionary period that the Revolution was in significant part fought and won to vindicate the colonial charters, and the States were

universally regarded as having succeeded to every territorial and property right which had been created by the charters and to every sovereign right of the crown itself pertaining to the colonial territories. Rights in the marginal sea were, of course, deemed an appurtenance of a land territory, passing along with that territory. Therefore, whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the rights of the crown (App. 342-43, 402-08). Plaintiff's witnesses substantially conceded these propositions (S.B. 315-16).

The territorial and property rights inherited by the States were not lost at the time of the Articles of Confederation. Article IX expressly provided that "no State shall be deprived of territory for the benefit of the United States." This language was not non-controversial or *pro forma;* to the contrary, it represented the victory of the adherents of State sovereignty in a hard, bitterly fought dispute over the western lands, which divided the revolutionary statesmen both during the war itself and thereafter (S.B. 316-28). While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, those States not possessing charter rights to the western lands did seek to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected. The western-lands controversy, ignored by the Master, furnishes the strongest possible proof that the States successfully insisted on preserving the sanctity of their charter claims in every respect, and that the federal government was regarded as acquiring no territory or property rights except those which each State chose to convey by cession.

Congress took this position in the most forceful and unambiguous terms during the negotiations which preceded the Peace of Paris of 1783. In arguing the contested American claim to the western lands, Congress steadfastly refused to rely on any argument of collective succession or devolution, but insisted throughout on relying exclusively on the sole and sufficient validity of the charter claims of the individual States (S.B. 321-27). The federal government did eventually acquire some of the western lands by State cession, but it has always regarded its title as founded solely on those acts of cession (S.B. 321). This Court has repeatedly so held.[64] In *Harcourt*, for example, the Court declared: "There was no territory within the United States that was claimed in any other right than that of some one of the confederated states. . . ." 25 U.S. (12 Wheat.) at 526.

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And *except* with respect to the western lands, nobody questioned the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government.

---

[64] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212-21, 222-24, 229-30 (1845) (S.B. 319-20); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823) (S.B. 358-60); Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (S.B. 361-62); and Poole v. Fleeger, 36 U.S. ((11 Pet.) 184 (1837) (S.B. 362).

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS, SHOW NO DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES IN WIDTH, AND ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES.

The negotiations preceding the Peace of Paris of 1783 were devoted in substantial part to the question whether American citizens would continue to be able to fish in the waters adjacent to Newfoundland, where their ancestors had fished from colonial times, or whether, now being foreigners *vis-a-vis* the coastal sovereign, they would be excluded. The American position papers during these negotiations made it clear that the American position fully recognized that "a reasonable tract" of coastal fishery belonged to the owner of the coast, and that 100 miles and 60 miles were the most common and recognized limits for the extent of that exclusive fishery (S.B. 330-33).[65]

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the boundaries of the United States should be on land as defined, and "comprehending all islands within 20 leagues of any part of the shores of the United States." Obviously the commissioners on both sides well knew that 60 miles (20 leagues) was one of the measurements most in vogue in in-

[65] With respect to the outer banks of Newfoundland, the American position was that those fisheries, being 35 leagues (about 105 miles) from land at their closest point, lay beyond the maritime belt within which an exclusive fishery could lawfully be claimed (S.B. 333). As to closer-in Canadian waters, the Americans negotiated for a share of those fisheries, *not* on the ground that these marginal seas were free to all, but solely on the ground that by long usage American fishermen had acquired a vested, established right in them (S.B. 330-32).

ternational law for the extent of exclusive fisheries and territorial waters; as we have just seen, the American position papers mentioned the 60-mile limit with respect to exclusive fisheries. The record contains copies of the maps used by both the British and American Commissioners in the negotiations, and both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States (Exhibits 327, 339, App. Vol. III; Exhibit 355).

Quite plainly, as Judge Jessup and Professor Smith[66] have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands (App. 134-36, 342-44; Tr. 1195-1206, 1271-77). As Judge Jessup has emphasized, in view of the long history of fisheries disputes and treaties in the North Atlantic waters, the provision was intended at least to recognize exclusive American fisheries out to the 20-league line (Tr. 1195). That conclusion is confirmed by the fact that the British copy of the map (Exhibit 327, App. Vol. III) also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries, and drew that line all up and down the coast of the United States, thus confirming that Britain had asserted exclusive fishing to that limit in the marginal seas of the Common Counsel States.

The retreat from the 100-mile boundaries of the charters to 60 miles for exclusive fisheries was obviously influenced by the freedom-of-navigation theories beginning to come into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and since the reason for the retrenchment

[66] Judge Jessup is identified at p. 55, *supra*. Joseph H. Smith is an eminent legal historian specializing in English and American colonial law (App. 240-46).

to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries.

The Master seems to suggest (Report, p. 64) that the "uniform" 20-league line implies that whatever marginal-sea rights were recognized by the treaty were confirmed to the United States collectively, not to each State individually. But it has never been questioned that islands off our coasts belong to the adjacent State, not to the United States as a separate territory. The States' title to their offshore islands depends, *vis-a-vis* Britain, on this very same provision of the treaty. The creation of a uniform 20-league belt carries no implication that it was to be federal rather than State territory. Indeed, the maritime belt in the North American coastal seas had always been uniform *vis-a-vis* other nations, although the crown might and did vary its grants from colony to colony. And the negotiating history of the treaty establishes beyond question the American position that all boundary and territorial claims were based on the titles of the individual States, derived from their charters (S.B. 321-27).

Finally, the Master relies (Report, p. 64) on this Court's observation in *United States v. Louisiana*, 363 U.S. 168 (1960), that the Treaty's 20-league provision should not be read to establish "territorial jurisdiction" over all waters within that belt. We submit that the entire record developed in this proceeding, and not available to the court in *Louisiana*, makes it clear that the assertion in 1783 of a 60-mile maritime belt, in the conventional "islands" language of the time, was wholly customary and in accordance with existing law. In any event, what matters here is that the treaty must, at minimum, be read as covering fisheries and other exploitable resources within the belt, whether or not full "territorial jurisdiction" was involved.

D. THE EXCLUSIVE RIGHT OF THE STATES TO EXPLOIT CONTINENTAL-SHELF RESOURCES WAS NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

It is clear, from history as well as policy, that the Constitution effected no transfer of continental-shelf rights from the States to the federal government. Certainly there was no express transfer. The Master relies on the foreign-affairs and defense powers as effecting a transfer by implication. As already shown (pp. 15-30, *supra*), nothing in those powers requires a transfer of property rights in the marginal sea or elsewhere, and the States' retention is far more compatible with the residual sovereignty, powers and responsibilities retained by them.

The Constitution itself, as noted earlier, refutes any claim that it transferred *sub silentio* any territory or property from the States to the federal government. It provides, in Article IV, Section 3, Clause 2 that "nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." The claims referred to are precisely claims to territory and property; the immediately preceding language is that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[67]

The thrust of the language is confirmed by its drafting history, which shows that the clause arose out of the western-lands controversy, and was intended to make clear that the Constitution did not prejudice the merits of any previously asserted State or federal title to those lands (S.B. 337-39). The clause was then broadened to make it clear that it applied to *all* territorial and property claims—such as claims to sovereignty and dominion in the marginal seas. Thus the

[67] Other provisions, previously noted, are also inconsistent with any notion of an implied transfer. See pp. 24-25, *supra*.

Constitution made it as certain as drafting could do that the vesting of certain governmental powers, such as foreign affairs and defense—"external sovereignty"—in the United States was not intended to carry any territory or property along with it.[68]

No case, except perhaps *California* and its progeny, has ever intimated that the Constitution effected any implied transfer of property.[69] It appears that the only prior case in which such a claim was made was *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818), where the Court rejected an argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Chief Justice Marshall declared:

> "The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of

---

[68] A proposal in the Constitutional Convention that unallocated State lands be transferred to the United States met with a total lack of support, and was quickly dropped (S.B. 339).

[69] The Master relies (Report, p. 63) on Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), and Massachusetts v. New York, 271 U.S. 65 (1926), for the proposition that a new sovereign inherits maritime sovereignty and dominion upon a transfer of sovereignty. The Master's citation simply begs the question, since the issue here is whether it is "external sovereignty" or "residual sovereignty" which controls the maritime rights here involved. The whole thrust of these and other decisions was of course that it was the States which inherited all maritime territory and property. This Court admitted in *California*, 332 U.S. at 36, that the pre-*California* cases plainly indicated that "the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

territory and of exclusive jurisdiction. . . . It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

"It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. *Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.* The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 388-89. (Emphasis added.)

E. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN THE MARGINAL SEAS AND SEABED.

It was universally recognized and understood throughout our history until the beginning of the "tidelands" controversy in the 1930's that the States individually retained whatever territorial and property rights existed in the marginal sea, and that no such rights had been transferred to the federal government by the Constitution or otherwise. The plaintiff made no such claim until 1937, when Secretary Ickes did so, reversing a position he had taken previously. Bartley, *The Tidelands Oil Controversy* 95-101, 128-35 (1953); U.S. Exhibit 11, p. 56. Little need be said about the universal understanding, since the Court in the

California case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *United States v. California,* 332 U.S. 19, 36 (1947).

While many of the cases dealt with internal waters rather than with the marginal sea, they all relied on the English law of property in land under water; and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The *California* Court ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." *Ibid.* The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the *Pollard* Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as

inland waters, with no distinction between them, just as had always been the case in English law and practice.

The *California* Court recognized that there were a number of cases which did specifically affirm State rights in the marginal seas, 332 U.S. at 37-38, and its own treatment of such decision actually understates their force. Speaking of *Manchester v. Massachusetts*, 139 U.S. 240 (1891), the Court observed that "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." *Id.* at 37. The *Manchester* Court, however, said nothing about limiting the Massachusetts fisheries statute in question, which extended to all of Massachusetts' waters, including its territorial sea. It held: "the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a minimum of three miles from the coast. *Id.* at 257.[70]

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, *Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* 50 and *passim* (1826);

[70] Since as we have seen the *California* Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions, it is unnecessary to discuss in detail the many similar decisions of this and other courts. See especially U.S. Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, pp. 23-26, 31-34, 48-49, 51-73, 101-26; U.S. Exhibit 11, pp. 7-8, 24-40, 51-52; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at S.B. 115-17 and 192.

Gould, *A Treatise on the Law of Waters* 75-76 and *passim* (1900). Other authorities to the same effect are cited at S.B. 378-79. We have found no authority to the contrary.

As noted earlier, there was also throughout the period 1783-1947 a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Neither plaintiff nor the Master has contested the assertion. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, *op. cit.* at 72-95.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them.[71]

Bartley aptly described the reaction to the *California* line of cases, in the light of the universal understanding prior thereto, as follows:

---

[71] Bartley, The Tidelands Oil Controversy, *passim* (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); Boone v. Kingsbury, 206 Cal. 148, 273 Pac. 797 (1928); Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n. 10. The *Boone* decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in this Court, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

"It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it—which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised successful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful commercial purposes. Later, with visiions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production." *Op. cit.* at 5; see also *id.* at 27-42.

In *United States v. Louisiana*, 363 U.S. 1, 17-19 (1960), this Court frankly recognized the overwhelming opposition to its *California* decision, and set forth conclusive evidence showing Congress' own view that the

decision was contrary to settled understanding. Quoting from the legislative history of the Submerged Lands Act, the Court described one of the Senate reports as follows:

> "S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:
>
> " 'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.
>
> * * *
>
> " 'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.' " 363 U.S. at 18, n. 17.

It is no less clear from the legislative history that the purpose of the Act was to *restore* a pre-existing title to the

States. Quoting from House and Senate reports, the Court acknowledged:

> "H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951):
>
> " 'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.'
>
> * * *
>
> " 'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.' "[72] 363 U.S. at 19, n. 17.

---

[72] In his separate opinion Justice Black, author of the *California* decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

> " 'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always con-

V.

LEGAL DEVELOPMENTS BETWEEN 1787 AND 1945 DID NOT DESTROY THE EXCLUSIVE RIGHT OF THE COMMON COUNSEL STATES TO EXPLOIT THE RESOURCES OF THEIR CONTINENTAL SHELVES.

The Master took the view that the 17th-century claims to maritime sovereignty and dominion vanished without a trace long prior to 1787, leaving a hiatus during which the rights of England and other nations stopped at low-water mark. Gradually a wholly new three-mile rule developed and, at some unspecified time, acquired the force of binding international law, foreclosing national claims to maritime areas beyond it (Report, p. 66). Since the federal government was a leading adherent of the three-mile limit, that adherence destroyed any remaining rights of the States beyond three miles, including rights to seabed resources (Report, p. 68).[73]

Then, the Master's argument continues, beginning with the Truman Proclamation of 1945 a wholly new rule of international law sprang up recognizing ownership of all continental-shelf resources by the adjacent nation (Report, pp. 68-70). The federal government, having earlier destroyed the states' title by its own conduct, now acquired the very same rights on its own behalf. The Master's theory is erroneous on several independent grounds.

---

sidered and acted upon the belief that these lands were the properties of the sovereign States.' " 363 U.S. at 91, n. 8.

[73] The Master concedes one exception: he asserts that, in a few isolated cases, national exclusive rights of exploitation were admitted over certain limited seabed resources beyond three miles on the basis of long enjoyment or actual exploitation (Report, p. 69).

A. PRESENT LAW, NOT PAST LAW, SHOULD BE THE TEST OF THE STATES' TITLE.

Even if the federal government had at one time adopted an international rule or practice inconsistent with national ownership of the shelf, the federal government has long since changed that position. Since 1945, by plaintiff's admission, it has been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the federal government's present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title.

In a court of equity, certainly, it would be unconscionable to presume that the federal government had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter, by reversing that course of conduct, it had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust.

Similarly, with respect to international law: even if for some period of years the claims of the Common Counsel States were repugnant to international law, in the end it was international law which gave way. On the Master's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law.

In the second Gulf States litigation, the Court measured the claims of the States against international law as it exists today. *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960). Comparably, if this Court or any international court were considering the federal government's asserted exclusive rights in the continental shelf as against other nations, it would not concern itself with the international law of the 19th or early 20th centuries, but solely with the law of today. There is no reason why any different treatment should be accorded to the claims of the Atlantic States.

B. THE THREE-MILE RULE DID NOT INVALIDATE THE STATES' TITLE TO SEABED RESOURCES.

The weight of authority is to the effect that the three-mile limit never became an obligatory rule of international law, even with respect to surface waters. At S.B. 409-14 we demonstrate that the height of popularity of the three-mile rule was very brief, lasting only from about 1880 to 1930, and that even during that period its status as an obligatory rule was denied by the majority of those scholars who treated the subject. The United States, moreover, was far from consistent in its adherence to the three-mile rule (S.B. 393-401).

The Master's own authority Fulton (writing in 1911) concedes that the three-mile limit was not an obligatory rule; that it was unsound to contend "that territorial jurisdiction cannot be carried further," and that wider claims "have been quite lately fully justified . . . by the most authoritative exponents of international law . . . as well as by various international congresses of fishery experts dealing with the subject from a fishery point of view." *Op. cit.* at 664.

In any case, the definitive answer to the Master's theory is that the three-mile limit was never regarded as fully ap-

plicable to the seabed and its resources or as outlawing claims of the sort the States make here.

The three-mile limit was not a wholly new rule, springing out of nothing and creating new national rights; it represented rather a restriction or retrenchment in the previous law which had permitted nations to claim and to exercise sovereignty over far broader maritime belts (App. 132). "The sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, *International Law* 78 (1888).[74]

The sole reason for this retrenchment was the desire of the principal maritime powers, including Britain and the United States, to maximize those maritime areas which were free for navigation, naval operations and to some extent surface fishing. See *e.g.*, Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 653-56 (1919). This rationale had no application to the exploitation of seabed resources. Exclusive seabed-resource exploitation could be carried out without any significant interference with freedom of navigation in the superjacent waters. Moreover, seabed resources were recognized as capable of overexploitation leading to exhaustion, and therefore as requiring regulation to ensure their preservation. The adjacent coastal state was recognized as having a legitimate interest in such resources which made it reasonable for other states to be excluded.

Every writer we have encountered recognized that the three-mile limit could not be applied fully or mechanically to the matter of seabed resources. Fulton, for example, asserted that sedentary fisheries, as well as the mineral

[74] Exclusive rights to exploit known seabed resources are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea." Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34, 43 (1923).

resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, *op. cit.* at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 697.[75]

This distinction was a natural one, because maritime boundaries have never been regarded as an all-or-nothing matter, requiring specification of a fixed line within which all sovereign rights are permitted and outside which all such rights are prohibited. As this Court remarked in *United States v. Louisiana*, 363 U.S. 1, 34 (1960), "assertions of jurisdiction to different distances may be recognized for different purposes." No one denies that the three-mile limit for full territorial sovereignty did not conflict with the assertion of national jurisdiction over far broader areas for such purposes as control of smuggling (S.B. 393-94). Likewise, the three-mile limit did not abrogate exclusive rights to exploit the resources of the continental shelf.

Borchard, writing in 1941 in defense of Florida's regulation of sponge fisheries beyond three miles, regarded occupation as only one of a number of grounds for vindicating that claim:

---

[75] *Accord*, the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923, Parliamentary Debates, May 30, 1923, cols. 1265-66; Jessup, The Law of Territorial Waters 13-17 (1927); 1 Oppenheim, International Law 628-29 (8th ed. Lauterpacht 1955); Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34 (1923) (App. 175-77); Waldock, "The Legal Basis of Claims to the Continental Shelf," 36 Grotius Society (1951) 115, 116-17.

"But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. *In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States,* and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. . . . Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit." Borchard, "Jurisdiction Over the Littoral Bed of the Sea," 35 *Am. J. Int'l L.* 515, 518-19 (1941). (Emphasis added.)

C. THE STATES' TITLE IS FULLY CONSISTENT WITH INTERNATIONAL LAW AND PRACTICE BOTH BEFORE AND AFTER THE TRUMAN PROCLAMATION

Far from being admitted only in a few special cases with peculiar histories, the exclusive right of coastal states to exploit and to regulate seabed resources in its adjacent continental shelf has been recognized and exercised over the years, including the period in which the three-mile rule had its greatest currency, all over the world and wherever exploitable resources exist. Judge Jessup—who is the leading

expert on the three-mile limit and law of the sea in this country and perhaps the world—discusses the evidence in detail at App. 173-230. He has adduced examples to this effect, relating to sedentary fisheries or subsea mining or both, all dating from long prior to the Truman Proclamation, in the adjacent waters of more than two dozen jurisdictions.[76]

Judge Jessup has shown that the virtually uniform practice of nations—which is the principal basis for determining international law (App. 109-13)—has been that, whenever an exploitable resource is discovered in the continental shelf of a coastal state, that state has asserted and exercised exclusive rights over exploitation of the resource.[77] He has likewise shown that such assertions have almost

---

[76] Algeria, The Bahamas, British Honduras, Burma, Canada, the Channel Islands, Ceylon, Colombia, Cuba, Egypt, England, France, Greece, India, Ireland, Italy, Japan, Libya, Mexico, Pakistan, Panama, the Persian Gulf states, The Philippines, the Red Sea, Tunisia, Turkey, the United States and Venezuela. The only instance Jessup found of the apparent *failure* of a coastal nation fully to regulate or to exclude foreign exploitation of such resources is the case of the Australian pearling industry prior to 1953 (App. 193-97), a situation due to special circumstances as O'Connell has shown, International Law in Australia 280-83 (1965). Since 1953, Australia has clearly asserted and exercised the exclusive power to control and to regulate these fisheries. *Id.* at 282-83; see S.B. 476.

[77] Plaintiff's witness Professor Henkin conceded the conclusive body of state practice on which we rely:

> "Q. . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A I don't know of any such examples." App. 541.

never been challenged, and never effectively challenged. It is precisely this widespread, consistent assertion of national rights, coupled with the failure of other states effectively to challenge such assertions, which is the best evidence for a rule of international law.

The leading authorities accord with Judge Jessup's views. The situation was thus summarized by P.R. Feith, speaking for the relevant committee of the International Law Association in 1950:

> "At all times and in many parts of the world coastal states, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside territorial waters, whenever this was technically possible.
>
> * * *
>
> "And there can be no doubt that international law has sanctioned such appropriation, even though it is in conflict with the idea of 'res communis.' " App. 198.

Edwin Borchard, an eminent American international-law authority, is to the same effect. After considering the legal bases for such claims,[78] he concludes:

---

[78] "Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question." Borchard, "Resources of the Continental Shelf", 40 *Am. J. Int'l L.* 53, 59-60 (1946).

> "Assertion of jurisdiction and acquiescence therein—without entering upon the abstruse question of title—must explain the coastal states' jurisdiction over unexploited resources in the continental shelf."

The United States' conduct has been fully consistent with this international practice. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land (App. 193; Ex. 345, pp. 213-17). Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

Judge Jessup summarized the matter in bringing the standards of international law to bear directly upon the issue of State claims:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies) . . . . From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. . . . I do not believe there would have been any significant international protest against that assertion. *And I believe that assertion*

> *would have been fully in accordance with the international law and practice of the time.* I think other sovereigns would have been bound to respect it, and I think they would have respected it. *And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries.*" (App. 229-30.) (Emphasis added.)

Judge Jessup rejected the suggestion that the federal government has ever renounced or abandoned the historic seabed claims of the Atlantic States (App. 502-03, 524).

D. INTERNATIONAL LAW AND PRACTICE DID NOT AND DOES NOT REQUIRE "OCCUPATION" IN ADVANCE OF DISCOVERY TO ESTABLISH PREEMPTIVE RIGHTS TO SEABED RESOURCES.

The Master's analysis of the States' claims is fundamentally flawed by the repeated assumption (see Report, pp. 39, 67-69) that the claims were vitiated by the States' failure to effect actual occupation of the submerged lands. In fact, as we show below, international law has never imposed any requirement of occupation by the coastal state in advance of the discovery of seabed resources.

It has been repeatedly recognized that any requirement of "effective occupation" found in the works of some writers was not in accordance with state practice and that, in any event, the standards for an "occupation" were so low as to make such a requirement essentially fictitious. Moreover, discussion has revolved around what a coastal state must do to validate its claim once an exploitable resource is discovered; no writer has ever, to the best of our knowledge, ever argued that "occupation" or any other act, even a bare claim, need antedate the discovery to give the coastal state the exclusive right to exploit a seabed resource once its discovery occurs.

Sir Hersch Lauterpacht, late Judge of the International Court of Justice and editor of the edition of Oppenheim's *International Law* from which the Master quotes, has given perhaps the most comprehensive demonstration that the claims asserted in the Truman and similar Proclamations were not inconsistent with prior international law. In his article "Sovereignty Over Submarine Areas," 27 *Brit. Y.B. Int'l L.* 376 (1950) (quoted *in extenso* at App. 155-67), Lauterpacht demolishes any notion of "effective occupation" as the test for the exclusive rights of a coastal state to its continental shelf:

> "The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.
>
> "Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. *For it is clear that in all cases in which the title to submarine areas has been proclaimed there has been no approximation to effective occupation.* There has been only a proclamation

and, in some cases, a conferment of concessions in respect of the areas in question. *This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas.* For modern international practice does not invariably consider effective occupation to be a condition of acquisition of title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal,* effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent — but to that extent only — is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the borderline between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration." App. 155-57.[79] (Emphasis added.)

And Lauterpacht concludes, just as the United States had done in the Bering Sea arbitration (pp. 124-25, *infra*), that what is really involved is an inherent right belonging

[79] Lauterpacht states at a later point:

"To speak of occupation of submarine areas is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions." App. 160.

only to the adjacent coastal state, not a requirement of "occupation" which could theoretically be exercised by any nation:

> "[T] he defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing—save the extra-legal remedies of intervention or self-preservation on the part of the coastal state — to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties—with states willing to do so—relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves." App. 162-63.

Lauterpacht's conclusion is that in the absence even of a claim the coastal state has an inherent right, which is perfected by a bare claim alone once an exploitable resource has been discovered.

> "It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'." App. 165.

Decades prior to the Truman Proclamation, in the 1890's, the United States took the official position that a coastal state has the exclusive right to exploit seabed resources beyond the three-mile limit, and that no occupation of the seabed was necessary to vindicate that right. This was done in the Bering Sea arbitration with Great Britain, where the United States attempted (unsuccessfully) to extend this principle to a surface seal fishery (S.B. 403-07; App. 215-27). As Judge Jessup pointed out (App. 217), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state—which was not disputed—and unsuccessfully attempted to reason from that fact to a sovereign right over *surface* fisheries."

The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation. The United States argued:

> "These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other." App. 221.

> "It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of

> mankind; which product, if it were thrown open to the whole world, would be destroyed." App. 221.

The British contended, just as the Master has found here, that the exclusive right to exploit seabed resources depended on effective occupation of the seabed. The United States squarely rejected that contention:

> "If they [seabed resources] are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability *to occupy the bottom*. That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation. . . ." App. 222-23.

The United States thus pointed out that the "occupation" theory squared neither with state practice nor with logic, since if occupation were the test an exclusive seabed right could be established not only by the coastal state but by any nation over a seabed anywhere in the world, whereas both state practice and economic considerations limited the exclusive right to that of a coastal state in the seabed of its adjacent waters. See also App. 220.[80]

---

[80] The decision of the arbitral tribunal said nothing about the "occupation" issue. The United States lost the case on the ground that

Given the background of state practice which we have described, it is not surprising that the continental-shelf proclamations of the 1940's by a number of nations, including the Truman Proclamation of 1945, were readily accepted, with hardly a dissenting murmur, as valid assertions of exclusive rights of the coastal sovereign. While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance.

Indeed, if the Master's position were correct, then President Truman and this country would have committed an internationally unlawful act by promulgating the Proclamation of 1945. See App. 524-25. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the continental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. In fact, as we have shown, at most the proclamation and its aftermath merely made more articulate, more systematic and more comprehensive what had always been the rights of coastal states.[81] In Lauterpacht's terms, the proclamation was "declaratory of an existing right" (p. 123, *supra*).

---

its interference with *surface* navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit. See S.B. 406-07.

[81] This was the general view taken of the legal significance of the Truman Proclamation both then and later. Judge Jessup has

Waldock, on whom the Master so heavily relies (Report, pp. 37, 69), was in entire agreement. As the passage quoted by the Master indicates (Report p. 37), Waldock did believe that under the law both before and after 1945 "occupation" of the seabed was in a sense necessary to validate a claim to the exclusive right to exploit seabed resources. However, Waldock believed that such an occupation could only be made by the adjacent coastal state, thus giving that state an exclusive right to occupy. Moreover, there is no word in Waldock's text suggesting that the occupation must be made *before* the discovery of exploitable resources. Finally and crucially, after describing the law as it existed "at the outbreak of the Second World War," 36 *Grotius Society* 115 (1951), Waldock goes on to inquire whether the Truman Proclamation was consistent with that law and concludes that it was. *Id.* at 138-49.

More specifically, he holds that the test of occupation "is not so rigorous as it is represented to be in some quarters"; that it is "impossible to maintain that actual settlement or exploitation is a *sine qua non* of effective occupation"; that "extensive assumption of jurisdiction over fairly extensive areas of sea-bed can probably be established without necessarily showing much or even any physical activity on the sea-bed itself." *Id.* at 140-41. While a proclamation asserting sovereignty to seabed areas on behalf of a non-adjacent coastal State would be a mere "paper occupation" having no legal effect, in the case of the coastal state the element of adjacency makes such a claim a valid act of appropriation. *Ibid.* Waldock concludes:

---

exhaustively shown (App. 145-73) that in the extensive discussions in international legal circles on the subject after 1945 the prevailing view was that the Truman Proclamation was consistent with prior law. This was likewise Lauterpacht's thesis in his article quoted at pp. 121-23, *supra*, and more extensively at App. 155-67.

> "[T]he Truman and similar Proclamations, having regard to the special circumstances of submarine territory and to the potentiality of control which contiguity gives, may properly be regarded as effective first acts of occupation. If, thereafter, such State activity takes place as the circumstances call for, the requirements of effective occupation as laid down in the leading cases would seem to be satisfied." *Id.* at 142.

Thus Waldock—the very authority on whom the Master almost exclusively relies as establishing a requirement of effective occupation in the pre-1945 law—squarely and explicitly rejects the Master's view that the Truman Proclamation was inconsistent with prior law and could be justified only by a "new continental shelf doctrine" (Report, p. 68). Waldock rejects the proposal that "an entirely new doctrine of customary law," *op. cit.* at 142, either was needed or should be adopted to validate claims such as that made by the Truman Proclamation.

The critical facts for this proceeding are that, under the law as it existed in and prior to 1945, (1) an outstanding claim to sovereignty and dominion over the continental shelf, such as was established by the law and claims of England in the 17th and 18th centuries and was embodied in the colonial charters, when coupled with such activity as the circumstances and the presence of exploitable resources warranted, was entirely sufficient to establish an exclusive right; (2) even in the absence of an outstanding claim the coastal state nonetheless possessed an exclusive right in that on the discovery of an exploitable resource it had the sole right to assert and to exercise exclusive title, and other nations could come in only if the coastal state failed to implement that right. Either of these elements of pre-1945 law would be sufficient to validate the States' claims in this proceeding. Both taken together surely are.

The Master relies heavily on the arbitral decision of Lord Asquith of Bishopstone in the Abu Dhabi Arbitration, 1 *International and Comparative Law Quarterly* (1952) 247, in which it was held that by a concession agreement of 1939 the ruler of Abu Dhabi did not intend to grant rights in the continental shelf outside territorial waters. As Judge Jessup has demonstrated (Tr. 517-19), the statements in the arbitrator's opinion on which the Master relies are dicta unnecessary to his decision, and "did not adequately appreciate the rules and principles of international law or the background of relevant international practice" App. 141.[82]

Moroever, Abu Dhabi so far as appears had never made any assertion of jurisdiction beyond three miles comparable to that made in English law and the colonial charters. And while under the Lauterpacht-Waldock view Abu Dhabi had, at the least, an inchoate and exclusive right to claim continental-shelf resources when those were discovered, such a right may well not have been covered by the particular concession language involved ("the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and of the islands and the sea waters which belong to that area"). Thus the case has little if any bearing on, let alone authority for, the issues presently involved.

---

[82] Arbitral decisions have no status in international law greater than what can fairly be ascribed to them on the basis of their intrinsic merits, including the force of their reasoning, and the stature of the arbitrator or arbitrators. See 1 Whiteman (U.S. Dept. of State), Digest of International Law 94-97 (1963). Lord Asquith of Bishopstone, the sole arbitrator in the *Abu Dhabi* arbitration, was not a recognized international jurist or publicist in any sense comparable, for example, to Jessup or Lauterpacht.

VI.

THE STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO THE SHELF DID NOT ARISE UNTIL 1945; AND FEDERAL LEGISLATION CANNOT CONSTITUTIONALLY BE READ TO DEPRIVE THE STATES OF THEIR RIGHTS, WHETHER HISTORIC OR MODERN.

Although the fundamental basis of the States' claims has been established by prior discussion, several related issues must be addressed to provide a complete statement of the States' argument. We show below that the States are entitled to the seabed resources in question whenever such rights arose; that at the very least equal treatment principles entitle the States to establish their historic claims to three leagues on the Atlantic Coast; and that with respect to these claims, as well as to the historic claims of the States based on their charters and crown-inherited rights, federal legislation would be unconstitutional if construed to deprive the States of their property without just compensation.

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL-SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE.

In prior sections of this brief it has been shown that the States have compelling historic claims to the seabed and its resources and that such claims were not cut off by the adoption of the Constitution or any international three-mile limit or surface jurisdiction. Even if the contrary be assumed, however, unquestionably national rights to the resources of the shelf do exist today. As between the States and the federal government, the States have by far the better claim.

There is no doubt that as against the rest of the world this nation has exclusive rights to develop the natural resources of the continental shelf on the Atlantic coast.

Proclamation 2667, made by President Truman on September 28, 1945, declared that:

> "The Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Comp.).

International law confirms this nation's entitlement. Article II of the 1958 Geneva Convention on the Continental Shelf recognizes the rights of a state, by virtue of its sovereignty over the land to exploit the resources of the continental shelf; and such rights have been confirmed by the International Court of Justice as "inherent" and "exclusive." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Yet, the Truman Proclamation does not purport to dictate whether the States or the federal government own these resources. On the contrary, Executive Order 9633, accompanying the Proclamation, stated that:

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." 3 C.F.R. 437 (1943-48 Comp.).

International law is similarly silent on this question.[83] On

[83] This Court, in United States v. Louisiana, 363 U.S. 1, recognized that the ownership of submerged lands appertaining to this nation is a matter of internal law and that ownership of such rights by the States presents no difficulty under international law. See p. 21, *supra*.

three different grounds, the States have the better claim to these rights.

First, the States' claims are directly supported by their status, under our constitutional framework, as residual sovereigns and owners of property rights within their borders. Even if continental-shelf rights are deemed to have arisen only in this century, this development rests upon a recognition that ownership of those rights is a natural extension of ownership of the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Upon this principle, ownership of the shelf, whenever it crystallized under international law, appertained to the States which were the residual owners of the adjacent lands, just as the creation of any territory by accretion vests ownership in the owner of the adjacent parcel (S.B. 453-54).

Second, even if the States' historic claims to the seabed and its resources based on their charters and crown-inherited rights were deemed defective—for example, because of some doubts concerning the scope of the charters or because of the contraction of rights based on 19th-century international-law developments—the States at least have far better historic claims than the federal government. The great weight of historical evidence during the colonial and federal periods points in the direction of State ownership. None of the historical evidence affirmatively supports the claim of the federal government

to ownership. Similarly, both common understanding and actual practice during 150 years of American history support State ownership.

Finally, as we have already shown, the regulatory and economic interests of the States are far more closely tied to the development of the submerged lands than the constitutional interests of the federal government. The latter can be properly secured by the normal, overriding exercise of federal regulatory authority to secure the national defense and to conduct the nation's foreign affairs. The States' interests, however, are broad-ranged ones requiring both police-power authority, to regulate the development of submerged lands, and the economic benefits of their ownership, to control and to offset the economic and social burdens and costs which such development inflicts on the adjacent coastal states. (See pp. 15-30, *supra*.)

The arguments set forth above are not lengthy because they rest on historical, constitutional and actual evidence and contentions that have been presented at length in connection with earlier points in this brief. Nevertheless, these arguments rest upon the settled principle of our constitutional system, namely, that the federal government is one of limited, delegated rights and powers and that all inherent and residual sovereignty and dominion remain with the separate States. Even if the States' claims somehow fall short of establishing a vested title, they are superior by every standard to plaintiff's claim.

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION.

Even if their more extensive claims are rejected, the Atlantic States should at minimum be allowed to establish

ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States. All States have a right to be treated equally by the federal government in respect of their sovereignty and political rights. This doctrine of "equal footing" or "equal status" is inherent in the Constitution, and the principle that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. *E.g., Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1882).[84]

The Master (Report, pp. 71-72) rejected the States' equal-footing claim on the ground that the equal-footing doctrine has been said to apply to "political rights" rather than "property." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). However, in the Submerged Lands Act Congress did not merely distribute property but gave to the Gulf States—but not to the other coastal States—the political or legal right of establishing their historic boundaries extending to three leagues to entitle them to exclusive continental-shelf rights. It is surely a sovereign or political right of the Atlantic States to be able to establish their own comparable historic boundaries for the same purpose.[85]

---

[84] As emphasized in Coyle v. Smith, 221 U.S. 559, 567 (1911),

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

[85] The Master also states that the Atlantic coastal States never claimed seaward boundaries beyond three miles (Report, p. 72). As

No one can plausibly suggest that the distinction drawn by the Act between Gulf and Atlantic coast States is based on any rational judgment based upon policy considerations. As the plaintiff virtually concedes (Pl. Post-Trial Br. 18), the basic reason why the Gulf States were afforded an opportunity to demonstrate that they possess a seaward boundary greater than three miles was that Congress was unaware of any claims by the Atlantic States to more distant boundaries. The discrimination is, therefore, unjustified by any rational judgment but rests on a misapprehension of fact. The misapprehension is quite understandable since the Atlantic coast was not the subject of mineral exploration in that period, but it cannot rescue an otherwise discriminatory provision.

Finally, the Master asserts (Report, p. 72) that the equal-treatment claim has been resolved adversely to the Atlantic States by *Alabama v. Texas*, 347 U.S. 272 (1954), although he acknowledged that the Court is free to reexamine that decision. That case, which arose in a different procedural context and involved different claims, cannot be deemed determinative.[84] In any event, if *Alabama v. Texas* did resolve the present equal-status claim on a summary basis, we submit that the case was wrongly decided and should be reexamined, especially because both it and the statutory distinction at issue were made in ignorance of the historic claims of the Atlantic States.

---

previous discussion shows, the Atlantic States at the time of their entry into the union had historic rights to submerged lands going well beyond three leagues.

[84] The Court there refused to allow the protesting States to file a complaint. Though equal-treatment arguments of a sort may have been made in that case, they apparently were submerged in a welter of unrelated contentions. The basic equal-treatment claim there, moreover, was aimed at depriving the Gulf States of resources beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues.

If the distinction between the Atlantic and the Gulf coastal States is unconstitutional, then it follows that the Atlantic States should be allowed the same opportunity as the Gulf States to prove their rights to the resources to a distance of three leagues. This Court has full authority to provide this remedy for a denial of equal treatment, and its aptness is reinforced by the severability clause of Section 17 of the Act.[87] Since a misapprehension of fact was Congress' sole apparent reason for denying the Atlantic States the equality of treatment they seek, the extension of such equal treatment is entirely consistent with the basic policy of the Act.

C. THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF SEABED RESOURCES.

Although the Master did not discuss the point, the plaintiff may contend in this Court that the Submerged Lands and Outer Continental Shelf Acts furnish an independent ground for extinguishing the States' claims even if they were valid until 1953. Such a reading of the Acts would be contrary to their purpose and, if adopted, would render them *pro tanto* unconstitutional. The legislative history of the federal legislation confirms, beyond a shadow of a doubt, that Congress had no purpose to deprive the States of their historic claims to the submerged lands. On the contrary, the legislation was designed to restore to the States their historical rights within the three-mile belt. Where Congress understood that claims to three leagues existed in the Gulf, it specifically

---

[87] See Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring); Champlin Ref. Co. v. Comm'r, 286 U.S. 210, 235 (1932). *Cf.* Schacht v. United States, 398 U.S. 58 (1970).

provided that the Gulf States should have the opportunity to establish such claims. See *United States v. Louisiana*, 363 U.S. 1 (1960).

The language of the legislation is, at best, ambiguous. There are, of course, provisions representing Congress' assumption that the Atlantic and Pacific States were not advancing any claims beyond the three-mile belt;[88] on the other hand, Section 4 of the Submerged Lands Act, 43 U.S.C. § 1312, expressly provides that nothing in the provision confirming the seaward boundaries of the original States at three miles and authorizing other States to fix similar boundaries shall prejudice the existence of "any State's seaward boundary beyond three geographical miles if its laws or constitution so provided at the time the State joined the Union." It is proper to resolve the ambiguity in light of Congress' purpose to preserve and not to foreclose the States' historic claims.

If read to divest States of their historic rights to continental-shelf resources beyond three miles, the legislation would be to that extent unconstitutional. The rights possessed by the States are unquestionably property rights, though they have other aspects as well.[89] The Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the federal government. While such property may indeed be taken under the power of eminent domain, the

---

[88] The principal language appears in a definitional provision of the Submerged Lands Act. Section 2(b), 43 U.S.C. § 1301(b). The Outer Continental Shelf Act merely incorporates by reference the assumptions or determinations of the Submerged Lands Act with respect to State ownership. See Sections 2-4, 43 U.S.C. § 1331-33.

[89] So far as the rights may be deemed territorial, the Constitution itself makes clear that the federal government may not diminish a State without its consent. See pp. 25, 102, *supra*.

Federal Government is not relieved of its duty to pay just compensation. As the Court states in *United States v. Carmack*, 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."[90]

Since no compensation was either offered or intended in this instance, any purported divestiture of the States' rights violates the Fifth Amendment.

In reply, it might be urged that no compensation need be paid on some public-use or trust theory (*Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9 (C.C.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1899)); but such a doctrine can have no application where, as here, the purpose of the taking is fundamentally economic in character.[91] Similarly, this is not a case in which an uncompensated taking from a

---

[90] See also Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941); St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 100-01 (1893); Yalobusha County v. Crawford, 165 F.2d 867, 869 (5th Cir. 1947); Wayne County v. United States, 53 Ct. Cl. 417, 423-24 (1918), *aff'd*, 252 U.S. 574 (1920).

[91] Quite a different question would be presented, of course, if the federal government, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding.

State can be defended on the ground that the federal use is "superior" *(In re Certain Land in Lawrence,* 119 F. 453 (D. Mass. 1902)).

Plaintiff has itself recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. § 1314, Congress provided as to the three-mile/three-league belt of land ceded to the States that the federal government had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

CONCLUSION

For the reasons stated above, the defendant States are entitled to judgment. They own exclusive exploitation rights in the continental shelf out to 100 miles pursuant to their historic title. Wherever the continental shelf off their coasts exceeds 100 miles in width, they own exclusive exploitation rights in the remainder as residual sovereigns of the coastline to which those exclusive rights pertain.

Respectfully submitted,

/s/: Brice M. Clagett

BRICE M. CLAGETT
MICHAEL BOUDIN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for the Common Counsel States

W. LAIRD STABLER, JR.
Attorney General of Delaware
CHARLES BRANDT
Assistant Attorney General
Public Building
Wilmington, Delaware 19801

JON A. LUND
Attorney General of Maine
LEE M. SCHEPPS
Assistant Attorney General
State House
Augusta, Maine 04330

FRANCIS B. BURCH
Attorney General of Maryland
HENRY R. LORD
Deputy Attorney General
One South Calvert Street
Baltimore, Maryland 21202

ROBERT H. QUINN
Attorney General of Massachusetts
HENRY HERRMANN
Special Assistant Attorney General
State House
Boston, Massachusetts 02133

WARREN B. RUDMAN
Attorney General of New Hampshire
DAVID H. SOUTER
Deputy Attorney General
State House Annex
Concord, New Hampshire 03301

WILLIAM F. HYLAND
Attorney General of New Jersey
ELIAS ABELSON
Assistant Attorney General
198 West State Street
Trenton, New Jersey 08608

LOUIS J. LEFKOWITZ
Attorney General of New York
JOSEPH T. HOPKINS
Assistant Attorney General
State Capitol
Albany, New York 12224

RICHARD J. ISRAEL
Attorney General of Rhode Island
W. SLATER ALLEN, JR.
Assistant Attorney General
Providence County Court House
Providence, Rhode Island 12903

ANDREW P. MILLER
Attorney General of Virginia
GERALD L. BALILES
Deputy Attorney General
Supreme Court Building
Richmond, Virginia 23219

NOVEMBER 29, 1974

CERTIFICATE OF SERVICE

I hearby certify that I have this 29th day of November, 1974, served three (3) copies of the foregoing Exceptions and Brief and of the Supplemental Brief and Appendices of the Common Counsel States by hand delivery upon The Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. and by first-class mail, postage prepaid, upon the Attorneys General of the States of Georgia, North Carolina and South Carolina.

/s/: Brice M. Clagett

Brice M. Clagett

November 29, 1974